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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 218

THE UNITED STATES OF AMERICA, PETITIONER

vs.

YELLOW CAB COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED JULY 24, 1950
CERTIORARI GRANTED OCTOBER 9, 1950

SUPREME COURT OF THE UNITED STATES

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No. 218

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"A" In The United States Court of Appeals for the Third Circuit

No. 9967

ROSE M. GUTMANN and ROBERT HENRY GUTMANN

vs.

YELLOW CAB COMPANY

vs.

UNITED STATES OF AMERICA, THIRD-PARTY DEFENDANT-APPELLANT

No. 9966

CALVIN HOWEY and JUSTINE A. HOWEY

vs.

YELLOW CAB COMPANY

vs.

UNITED STATES OF AMERICA, THIRD-PARTY DEFENDANT-APPELLANT

Appeal from the judgment of the District Court of the United States for the Eastern District of Pennsylvania at Nos. 7715 and 7857 respectively

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Appendices of appellant

Filed Aug. 1, 1949

[File endorsement omitted.]

1a *Appendix—Gutmann case*

In The United States District Court for the Eastern District of Pennsylvania

Civil Action No. 7715

ROSE M. GUTMANN and ROBERT HENRY GUTMANN

vs.

YELLOW CAB COMPANY

vs.

UNITED STATES OF AMERICA, THIRD-PARTY DEFENDANT

Docket entries

1947

Sept. 9, Complaint filed.

Sept. 9, Summons exit.

Sept. 16, Summons returned: "On Sept. 11, 1947 served" and filed.

2a Sept. 23, Motion for and Order of Court granting leave to defendant to bring in The United States as a Third-Party Defendant, filed.

Sept. 24, Third-Party Complaint, filed.

Sept. 24, Third-Party Summons exit.

Sept. 24, Answer filed.

Oct. 1, Third-Party Summons returned: "On Sept. 25, 1947 served U. S. Atty," and filed.

Oct. 3, Appearance of Gerald A. Gleeson, Esq. for Third-Party Defendant filed.

Dec. 4, Order to place case on the Jury Trial List filed.

Dec. 17, Stipulation of counsel extending time for filing answer to 3rd party complaint to Dec. 24, 1947 and Order of Court approving the same filed.

Dec. 24, Motion by Third-Party defendant to Dismiss, filed.

Dec. 24, Order to place case on Argument list, filed.

1948

Feb. 9, Argued sur motion of 3rd party defendant to dismiss, C. A. V.

Mar. 17, Plaintiff's interrogatories to defendant, filed.

Mar. 31, Order of Court denying motion to dismiss third party action filed. 4/1/48 Noted & Notice mailed.

Apr. 9, Answer of Third-party defendant, filed.

1948

Aug. 25, Motion for leave to serve amended complaint, filed.

Aug. 25, Order to place case on the Argument list, filed.

3a Sept. 13, Hearing sur motion for leave to serve Amended Complaint continued to Sept. 20, 1948.

Sept. 20, Hearing (Submitted on briefs) C. A. V.

Oct. 7, Order of Court denying motion for leave to serve amended complaint filed. 10/7/48 Noted & notice mailed.

Oct. 19, Trial (Kirkpatrick, J.) Witnesses sworn.

Oct. 20, Trial concluded.

Nov. 19, Testimony of Oct. 19 & 20, 1948, filed.

Dec. 10, Requests of United States for findings of fact and Conclusions of law, filed.

1949

Jan. 4, Opinion, Kirkpatrick, J. finding in favor of Rose M. Gutmann in $800 and in favor of Robert Henry Gutmann in the sum of $5000 and against Yellow Cab Co.; and in favor of Yellow Cab Co. and against United States in the sum of $2900 filed.

Jan. 4, Judgment in favor of Rose M. Gutmann in $800 and in favor of Robert Henry Gutmann in $5000 against Yellow Cab Co.; and in favor of Yellow Cab Co. against United States in $2900 filed. 1/5/49 Noted & Notice Mailed.

Jan. 11, Motion to set aside verdict and/or judgment of United States filed.

Feb. 7, Argued sur motion of U. S. to set aside verdict C. A. V.

Feb. 25, Opinion, Kirkpatrick, J. denying motion of U. S. to set aside verdict, filed.

4a Feb. 25, Notice of Appeal of Third-party defendant filed. 4/26/49 Copies to M. J. Meyer, Esq., S. A. Blank, Esq. and Jas. J. Leyden, Esq.

Feb. 25, Copy of Clerk's Notice to U. S. Court of Appeals filed.

May 19, Plaintiffs' requests for findings filed.

May 19, Defendants' requests for findings filed.

5a *Complaint*

(No. 7715)

1. Plaintiffs are citizens of the Commonwealth of Pennsylvania and defendant is a corporation created and existing under the laws of Delaware. The matters in controversy, exclusive of interest and costs, each exceed the sum of $3,000.00.

2. On December 1, 1946, defendant owned, and by its agent and servant, possessed, controlled, and operated the taxicab involved in the accident hereinafter described.

3. On said date plaintiffs were passengers in said taxicab, which was proceeding south on Mascher Street and when it came to Ashdale Street it was so negligently and carelessly controlled and operated that it collided with a United States Mail truck, causing plaintiffs herein to be severely injured.

4. As a result thereof plaintiff, Rose Gutmann, sustained injuries to her knee, hip and shoulder, and severe nervous shock, which injuries have caused her great pain and suffering and have prevented her from attending to her usual duties; all of which may be permanent in character.

5. As a further result of said accident plaintiff, Rose Gut-
6a mann, has incurred various expenses for medical and hospital care and medicines, all of which may continue in the future.

6. Plaintiff, Robert Henry Gutmann, sustained a fracture of the left clavicle, injuries to his body and limbs and severe nervous shock, which injuries have caused him great pain and suffering and have prevented him from attending to his usual duties; all of which may be permanent in character.

7. As a further result of said accident plaintiff, Robert Henry Gutmann, has incurred various expenses for medical and hospital care and medicines, all of which may continue in the future.

Wherefore, there is claimed of the defendant on behalf of Robert Henry Gutmann, the sum of $10,000.00 and on behalf of Rose Gutmann, the sum of $3,500.00.

(S) MILFORD J. MEYER,
1904 North American Bldg., Philadelphia 7, Penna.

SAMUEL A. BLANK,
1000 Liberty Trust Bldg., Philadelphia 7, Penna.
Attorneys for Plaintiffs.

7a *Motion to bring in third-party defendant*

(No. 7715)

Defendant, Yellow Cab Company, moves for leave to make the United States of America a party to this action and that there be served upon such third-party defendant summons and third-party Complaint as set forth in Exhibit "A" hereto attached.

(S) JAMES J. LEYDEN,
Attorney for Defendant,
Yellow Cab Company,
1719 Packard Building, Philadelphia 2, Pa.

Order

And now this — day of September 1947, it appearing that the Complaint was served upon Yellow Cab Company on September 11, 1947, it is ordered that the clerk shall issue summons and third-party complaint to be served upon the said third-party defendant.

(S) GUY K. BARD, *J.*

8a *Exhibit "A"*

SUMMONS

To the above named Third-Party Defendant:

You are hereby summoned and required to serve upon Milford J. Meyer, Esquire, plaintiffs' attorney, whose address is 1904 North American Building, Philadelphia 7, Pennsylvania, and James J. Leyden, Esquire, attorney for Yellow Cab Company, defendant and third-party plaintiff, whose address is 1719 Packard Building, Philadelphia 2, Pennsylvania, an answer to the third-party complaint, copy of which is herewith served upon you, and an answer to the complaint of the plaintiff, copy of which is herewith served upon you, within 20 days after the service of this summons upon you exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the third-party complaint.

Dated:

[SEAL] ———— ————, *Clerk of Court.*

THIRD-PARTY COMPLAINT

1. Plaintiffs, Rose M. Gutmann and Robert Henry Gutmann, have filed against defendant a complaint, copy of which is hereto attached as Exhibit "B".

9a 2. At the time and place of the accident referred to in plaintiff's Complaint, the plaintiffs were passengers in the taxicab of the defendant, Yellow Cab Company.

3. At the time of the collision referred to in the Complaint, the mail truck owned by the United States of America was being operated by one Paul Henry Stephens, 2125 North 30th Street, Philadelphia, Pennsylvania, who was then and there acting within the scope of his office or employment as an employe of the Post Office Department of the United States of America.

4. For any injury or damages which plaintiffs may have suffered, the third-party defendant is or may be liable to the de-

fendant or to the plaintiffs for all or part of the plaintiffs' claim against defendant.

Wherefore, Yellow Cab Company demands judgment against the third-party defendant, United States of America, for all sums that may be adjudged against defendant, Yellow Cab Company, in favor of plaintiffs, Rose M. Gutmann and Robert Henry Gutmann.

(S) JAMES J. LEYDEN,
Attorney for defendant,
Yellow Cab Company,
1719 Packard Building, Philadelphia, 2, Pa.

10a *Exhibit "B"*

COMPLAINT

1. Plaintiffs are citizens of the Commonwealth of Pennsylvania and defendant is a corporation created and existing under the laws of Delaware. The matters in controversy, exclusive of interest and costs, each exceed the sum of $3,000.00.

2. On December 1, 1946, defendant owned, and by its agent and servant, possessed, controlled, and operated the taxicab involved in the accident hereinafter described.

3. On said date plaintiffs were passengers in said taxicab, which was proceeding south on Mascher Street and when it came to Ashdale Street it was so negligently and carelessly controlled and operated that it collided with a United States Mail truck, causing plaintiffs herein to be severely injured.

4. As a result thereof plaintiff, Rose Gutmann, sustained injuries to her knee, hip, and shoulder, and severe nervous shock, which injuries have caused her great pain and suffering and have prevented her from attending to her usual duties; all of which may be permanent in character.

5. As a further result of said accident, plaintiff, Rose Gutmann, has incurred various expenses for medical and
11a hospital care and medicines, all of which may continue in the future.

6. Plaintiff, Robert Henry Gutmann, sustained a fracture of the left clavicle, injuries to his body and limbs and severe nervous shock, which injuries have caused him great pain and suffering and have prevented him from attending to his usual duties; all of which may be permanent in character.

7. As a further result of said accident plaintiff, Robert Henry Gutmann, has incurred various expenses for medical and hospital care and medicines, all of which may continue in the future.

Wherefore, there is claimed of the defendant on behalf of Robert Henry Gutmann, the sum of $10,000.00 and on behalf of Rose Gutmann, the sum of $3,500.00.

MILFORD J. MEYER,
1904 North American Bldg., Philadelphia 7, Penna.

SAMUEL A. BLANK,
1000 Liberty Trust Bldg., Philadelphia 7, Penna.,
Attorneys for Plaintiffs.

12a *Third-party complaint*

(No. 7715)

1. Plaintiffs, Rose M. Gutmann and Robert Henry Gutmann, have filed against defendant a complaint, copy of which is hereto attached as Exhibit "B".

2. At the time and place of the accident referred to in plaintiffs' complaint, the plaintiffs were passengers in the taxicab of the defendant, Yellow Cab Company.

3. At the time of the collision referred to in the Complaint, the mail truck owned by the United States of America was being operated by one Paul Henry Stephens, 2125 North 30th Street, Philadelphia, Pennsylvania, who was then and there acting within the scope of his office or employment as an employee of the Post Office Department of the United States of America.

4. For any injury or damages which plaintiffs may have suffered, the third-party defendant is or may be liable to the defendant or to the plaintiffs for all or part of the plaintiffs' claim against defendant.

Wherefore, Yellow Cab Company demands judgment against the third-party defendant, United States of America, for
13a all sums that may be adjudged against defendant, Yellow Cab Company, in favor of plaintiffs, Rose M. Gutmann and Robert Henry Gutmann.

(S) JAMES J. LEYDEN,
Attorney for defendant,
Yellow Cab Company,
1719 Packard Building, Philadelphia 2, Pa.

Exhibit "B"

COMPLAINT

1. Plaintiffs are citizens of the Commonwealth of Pennsylvania and defendant is a corporation created and existing under

the laws of Delaware. The matters in controversy, exclusive of interest and costs, each exceed the sum of $3,000.00.

2. On December 1, 1946, defendant owned, and by its agent and servant, possessed controlled and operated the taxicab involved in the accident hereinafter described.

3. On said date plaintiffs were passengers in said taxicab, which was proceeding south on Mascher Street and when it came to Ashdale Street it was so negligently and carelessly controlled and operated that it collided with a United States Mail truck, causing plaintiffs herein to be severely injured.

4. As a result thereof plaintiff, Rose Gutmann, sustained injuries to her knee, hip, and shoulder, and severe
14a nervous shock, which injuries have caused her great pain and suffering and have prevented her from attending to her usual duties; all of which may be permanent in character.

5. As a further result of said accident, plaintiff, Rose Gutmann, has incurred various expenses for medical and hospital care and medicines, all of which may continue in the future.

6. Plaintiff, Robert Henry Gutmann, sustained a fracture of the left clavicle, injuries to his body and limbs and severe nervous shock, which injuries have caused him great pain and suffering and have prevented him from attending to his usual duties; all of which may be permanent in character.

7. As a further result of said accident plaintiff, Robert Henry Gutmann, has incurred various expenses for medical and hospital care and medicines, all of which may continue in the future.

Wherefore, there is claimed of the defendant on behalf of Robert Henry Gutmann, the sum of $10,000.00 and on behalf of Rose Gutmann, the sum of $3500.00.

MILFORD J. MEYER,
1904 North American Bldg., Philadelphia, 7, Pa.

SAMUEL A. BLANK,
1000 Liberty Trust Bldg., Philadelphia, 7, Penna.,
Attorneys for Plaintiffs.

15a *Answer*

(No. 7715)

I

FIRST DEFENSE.

1-2. Defendant, Yellow Cab Company, admits the averments contained in paragraphs 1 and 2 of the Complaint, except that it denies that the matters in controversy, exclusive of interest and costs, exceed the sum of $3,000.00.

3. Defendant, Yellow Cab Company, admits that plaintiffs were passengers in its taxicab which was south-bound on Mascher Street, and that at Ashdale Street defendant's taxicab and the United States Mail truck were in collision. Defendant denies that its taxicab was operated in a negligent and careless manner, but on the contrary avers that its taxicab was then and there operated in a careful, lawful and prudent manner with all due care under the circumstances.

4–7. In answer to the averments contained in paragraphs 4 to 7 inclusive of the Complaint, defendant is without knowledge or information sufficient to form a belief as to the truth of said averments.

16a

II

SECOND DEFENSE

Defendant's taxicab was operated in a careful, lawful and prudent manner, and any injury or damage sustained by the plaintiffs was the result of the negligent and careless manner in which the aforesaid United States mail truck was operated.

(S) JAMES J. LEYDEN,
Attorney for Yellow Cab Company.

17a *Motion to dismiss*

(No. 7715)

The United States of America, third-party defendant above, by Gerald A. Gleeson, Esquire, United States Attorney for the Eastern District of Pennsylvania, attorney for the third-party defendant, moves the Court as follows:

(1) To dismiss as third-party defendant the United States of America, for the reason that the Federal Tort Claims Act under which the defendant attempts to join the United States of America as third-party defendant, does not authorize the maintenance of suits upon Derivative Claims.

(S) GERALD A. GLEESON,
United States Attorney.

18a *Order sur third-party defendant's motion to dismiss*

(No. 7715)

And now, to wit, this 31st day of March 1948, upon consideration of the foregoing motion, it is ordered that the same be and is hereby denied.

By the Court,

(S) KIRKPATRICK, *J.*

19a *Answer of third-party defendant*

(No. 7715)

Gerald A. Gleeson, United States Attorney for the Eastern District of Pennsylvania, and attorney for the United States of America, in the above-listed matter, avers the following in answer to Third-Party Complaint in said matter:

First Defense: The allegation of paragraphs 1, 2 and 3 of the Third-Party Complaint are admitted. The Third-Party Defendant denies each and every other allegation contained in said Third-Party Complaint.

Second Defense: The Complaint fails to state a claim against the Third-Party Defendant upon which relief can be granted.

Third Defense: Any injuries or damages which the Plaintiffs suffered were due to the negligent conduct of the Third-Party Plaintiff.

Wherefore, the Third-Party Defendant prays that the Third-Party Complaint be dismissed, with costs.

(S) GERALD A. GLEESON,
United States Attorney.

20a *Evidence on behalf of Yellow Cab Company, defendant*

(Nos. 7715 and 7857)

PHILADELPHIA, PA., *October 20, 1948.*

Before Hon. WILLIAM H. KIRKPATRICK, *J.*

Mr. LEYDEN. At this time, may it please the Court, I would like to offer into evidence paragraph 3 of the third-party complaint of the Yellow Cab Company, which has to do with the ownership, operation, and that the driver of the mail truck was acting within the course and scope of his employment, and the corresponding paragraph 3 of the Government's answer, which admits that allegation.

Paragraph 3 of the Third-Party Complaint of the Yellow Cab Company reads:

"3. At the time of the collision referred to in the Complaint, the mail truck owned by the United States of America was being operated by one Paul Henry Stephens, 2125 North 40th Street,
21a Philadelphia, Pennsylvania, who was then and there acting within the scope of his office or employment as an employee of the Post Office Department of the United States of America."

The First Defense of the Answer of Third-party Defendant reads:

"First Defense: The allegations of paragraphs 1, 2, and 3 of the Third-Party Complaint are admitted. The Third-Party Defendant denies each and every other allegation contained in said Third-Party Complaint."

Mr. LEYDEN. Is the cab driver here?

The COURT. Before you call him I will recess for a minute.

LOUIS HAIMOVITZ, having been duly sworn, was examined and testified as follows:

Mr. GAY. May it please the Court, since the third-party plaintiff is now carrying the ball, I would like to move for a directed verdict for the Government, because the Government takes the position it is not properly a party to this action, that the Court has no jurisdiction; and secondly because the complaint, the third-party complaint, does not allege any negligence on the part of the Government; assuming that it takes the position that if we are properly a party, the pleadings have not alleged that we were negligent, which it seems to us would be the only ground of recovery.

22a Mr. LEYDEN. May it please the Court, I don't think Your Honor has to hear me on the first point because that has already been decided once on a motion and briefs. If you want to hear me I will be glad to give you my reasoning in regard to it. But having passed——

The COURT. No; I think we can reserve it. I will overrule the motion now and I think we can reserve it.

Mr. LEYDEN. Now, on the second point, I am just a little bit shocked and greatly surprised. This question that counsel has now raised came up sometime ago and I wrote a letter to him to which to date I have never received a reply—I think you have it, Walter—which I will read to Your Honor, if I can find it here.

Under date of April 13, 1948, I wrote a letter to Mr. Walter Gay, thanking him for his letter of April 9th, and stated, I assume from our recent telephone conversation that you will have no objection to my amending the third-party complaint at the time of trial to aver that the mail truck was negligently operated. If I am in error will you kindly so advise me, so that I may take the necessary formal steps to conform the pleadings to what is evident to everybody?

There has been no secret about this thing from the very start.

23a The COURT. Do you move to amend?

Mr. LEYDEN. And I move now for leave to amend.

The COURT. I will allow the amendment.

Mr. GAY. Your Honor, I may say I had forgotten the letter, but I certainly thought he would ask the right to amend, and under the rules I assumed it would be granted, but I didn't want the——

The COURT. All right.

Mr. LEYDEN. Well, I thought the testimony would take care of that.

24a *Opinion sur pleadings and proof*

(Nos. 7715 and 7857)

Before KIRKPATRICK, *Ch. J.*

At the intersection of Ashdale and Mascher Streets, Philadelphia, Pennsylvania, on December 1, 1946, a mail truck going east on Ashdale ran into a taxicab going south on Mascher. The plaintiffs were passengers in the taxicab and were all injured in varying degrees.

The mail truck operator was negligent. He did not stop at the intersection, although a stop sign making Mascher a through street required him to do so. Even so, he might have avoided the collision by the exercise of due care. He had seen the taxi coming and knew that it was moving faster than he was, but drove on, apparently in a mistaken belief that he could get across the intersection first, at an increased speed and without changing his direction until the last minute.

The taxicab driver was also negligent, though in a lesser degree. By his own testimony, just before he entered the intersection he saw the mail truck coming about a hundred feet away on Ashdale Street. He could reasonably expect that it would stop but that did not relieve him of the duty of keeping an eye on
25a it. Heimburger v. Grundy, 348 Pa. 114. Actually his duty to do so was more absolute that that of the appellant in that case, because this driver was conveying paid passengers. O'Connell v. Quaker City Cab Co., 84 Pa. Super. 323. As a matter of fact he did not look or see the mail truck again until just before it struck him, at a point at least halfway across the intersection. He then did the best he could to escape the crash but it was too late.

I therefore find that both drivers were at fault and that the negligence of each was a substantial factor in causing the accident. My verdict is for each of the plaintiffs against the defendant, Yellow Cab Company, in the amounts stated below, and for the defendant third party plaintiff, Yellow Cab Company, against the third party defendant, the United States of America,

in the amount of $3,900, being one-half of the amounts for which the defendant is liable to the plaintiffs:

Rose M. Gutmann	$800.00
Robert Henry Gutmann	5,000.00
Calvin Howey	200.00
Justine A. Howey	1,800.00

I conclude that the defendants are liable as above and direct judgment accordingly.

26a *Judgment*

(No. 7715).

Before KIRKPATRICK, *J.*

And now, to wit: January 4th, 1949, in accordance with the Opinion of the Court, it is ordered that Judgment be and is hereby entered in favor of Plaintiff, Rose M. Gutmann in the sum of Eight Hundred and 00/100 ($800.00) Dollars, and in favor of Plaintiff, Robert Henry Gutmann, in the sum of Five Thousand and 00/100 ($5000.00) Dollars and against the Defendant and Third-Party Plaintiff, Yellow Cab Company, together with costs.

And it is further ordered that Judgment be and is hereby entered in favor of Defendant and Third-Party Plaintiff, Yellow Cab Company, and against the Third-Party Defendant, United States of America in the sum of Two Thousand Nine Hundred and 00/100 ($2,900.00) Dollars.

By the Court:

Attest:

(S) GILBERT W. LUDWIG,
Deputy Clerk.

27a *Motion to set aside verdict and/or judgment*

(Nos. 7715 and 7857)

And now, this — day of January, A. D., 1949, comes Gerald A. Gleeson, United States Attorney for the Eastern District of Pennsylvania, and attorney for the United States of America, Third-Party Defendant in the above-listed cases, and moves the Court to set aside the verdict and/or judgment entered in said cases and in support thereof avers the following:

1. This Court has no jurisdiction over the United States of America, Third-Party Defendant herein.

2. The Complaint of Yellow Cab Company, Defendant and Third-Party Plaintiff, does not state a cause of action against the United States of America, Third-Party Defendant, on which this Court may grant relief.

(S) GERALD A. GLEESON,
United States Attorney,
Attorney for United States of America,
Third-Party Defendant.

28a *Opinion sur motion of third-party defendant to set aside verdict*

(No. 7715)

Before KIRKPATRICK, *Ch. J.*

The plaintiffs, passengers in a taxicab, were injured in a collision with a United States mail truck. They brought this action against the Yellow Cab Company, owner of the taxicab, which thereupon filed a third-party complaint against the United States, the purpose of which was to enforce its right of contribution. The Court denied a motion to dismiss the third-party complaint and the case proceeded to trial before the Court without a jury. The Court found the drivers of both vehicles negligent, assessed damages in the total amount of $7,800, and, in the third-party proceeding, found a verdict for the Yellow Cab Company against the United States, in the amount of $3,900, being one-half of the plaintiffs' recovery. The United States now moves to set aside the verdict against it.

The Tort Claims Act provides that suits under it shall be governed by the Federal Rules of Civil Procedure, with certain exceptions or modifications as to counterclaims. The third-party practice provided by Rule 14 is not one of the exceptions and it follows that such practice is permissible under the Tort
29a Claims Act, provided the third-party claim is to enforce a liability for which the United States has consented to be used under that Act.

The government argues that the Tort Claims Act does not contemplate or permit joinder of the United States with other defendants in a tort action. However, all that the government's argument upon this point, if accepted, establishes is that the government may not be joined as a co-defendant in a suit to recover damages from it and others for a joint tort. In the present action, as originally brought, there was no joinder. The plaintiffs sued only the Yellow Cab Company, alleging that their in-

juries were caused by its negligence and not suggesting a joint tort. The claim of the Yellow Cab Company for contribution, asserted in the third-party complaint, is in effect a separate action and could just as well have been brought as such.

The Tort Claims Act, Sec. 410 (a) gives the Court jurisdiction to hear "any claim * * * on account of personal injury or death caused by the negligent or wrongful act * * *" of employees of the government. Note that the statute does not say a "claim for damages on account of personal injury", but merely a "claim on account of personal injury". The right which the Yellow Cab Company asserts against the United States in this case stems from a personal injury caused in part at least by the negligent act of a government employee and, even by the strictest possible construction of the language of the statute, is a claim on account of such injury.

The third-party proceeding is based on the law of Pennsylvania, which is that one joint tortfeasor has " * * * a substantive legal right to contribution from his joint tort feasor * * *", as the result of a verdict against it. Fisher v. Diehl, 156 Pa. Sup. 476, 482. The Yellow Cab Company is seeking to hold the United States " * * * liable in respect of such claim(s) * * *" in the same manner, and to the same extent as a private individual under like circumstances * * *" Tort Claims Act, Sec. 410 (a).

30a

The government makes the further point that the complaint asks not for contribution but for indemnity and that it must be dismissed, first, because it fails to state facts supporting a cause of action for indemnity and, second, because, if it did, there is no right to proceed for indemnity outside the Tucker Act. The contention is without merit. The third part' complainant does indeed demand judgment against the United States " * * * for all sums that may be adjudged against defendant, Yellow Cab Company, in favor of plaintiffs * * *" However, it sets forth the facts of the accident and then says "For any injury or damages which plaintiffs may have suffered, the third-party defendant is or may be liable to the defendant or to the plaintiffs for all or part of the plaintiffs' claim against defendant." It thus states, in the alternative, a liability on the part of the United States for (a) all, or (b) part, of the plaintiffs' claim against the Yellow Cab Company. To hold that, because a claim based on an indemnity agreement can be spelled out of the complaint, it must be dismissed in spite of the fact that contribution is also asked for, would be directly in the fact of Continental Collieries

v. Shober, 130 Fed. 2d 631, 635, and a multitude of other decisions which hold that "* * * * there is no justifica-
31a tion for dismissing a complaint for insufficiency of statement, except where it appears to a certainty that the plaintiff would not be entitled to relief under any state of facts which could be proved in support of the claim." The Court can sustain the third-party complaint as stating a good cause of action for contribution by disregarding as surplusage the part of the prayer which asks judgment for all of the plaintiffs' claims against the defendant and it is the duty of the Court to do so.

The motion is denied.

32a *Notice of appeal*

(No. 7715)

Notice is hereby given that United States of America, Third-Party Defendant, hereby appeals to the United States Court of Appeals for the Third Circuit from the Order of the Court dated February 25, 1949, denying the Motion of the United States of America, Third-Party Defendant, to set aside the verdict and/or judgment, in the above entitled case.

(S) GERALD A. GLEESON,
United States Attorney.

33a *Appendix—Howey case*

In the United States District Court for the Eastern District of Pennsylvania

Civil Action No. 7857

CALVIN HOWEY and JUSTINE A. HOWEY, HIS WIFE

vs.

YELLOW CAB COMPANY

vs.

UNITED STATES OF AMERICA, (3RD-PARTY DEFT.)

Docket entries

1947

Oct. 27, Complaint filed.

Oct. 27, Summons exit.

Nov. 5, Appearance of James J. Leyden, Esq. for defendant filed.

Nov. 5, Motion to bring in Third Party defendant and Order of

1947

Court granting motion filed. 11–6–47 Noted & Notice mailed.

34a Nov. 5, Third party complaint filed.

Nov. 5, Third Party Summons exit.

Nov. 5, Answer of Yellow Cab Co. filed.

Nov. 14, Summons returned: "on Oct. 29, 1947 served" and filed.

Dec. 3, Third-Party Summons returned: "on Nov. 6, 1947, served" and filed.

Dec. 24, Appearance of Gerald A. Gleeson, Esq., for U. S. filed.

Dec. 31, Motion by U. S. to dismiss, filed.

Dec. 31, Order to place case on argument list filed.

1948

Feb. 9, Argued sur motion of 3rd party defendant to dismiss. C. A. V.

Mar. 25, Appearance of Meyer, Lasch, Hankin & Poul, Esqs. for plaintiff filed.

1948

Mar. 29, Order to place case on the Trial List filed.

Mar. 31, Order of Court denying motion to dismiss third-party complaint filed. 4/1/48 Noted & notice mailed.

Apr. 9, Answer of third-party defendant, filed.

Aug. 25, Plaintiff's motion for leave to serve amended complaint and affidavit in support thereof, filed.

Aug. 25, Order to place case on Argument List, filed.

Oct. 19, Trial (Kirkpatrick, J.) Witnesses sworn.

Oct. 20, Trial concluded.

Nov. 19, Testimony of Oct. 19 & 20, 1948, filed (#7715).

35a Dec. 10, Requests of United States for Findings of Fact and Conclusions of Law, filed. (See #7715.)

1949

Jan. 4, Opinion, Kirkpatrick, J. finding in favor of Calvin Howey in the sum of $200 and in favor of Justine A. Howey in the sum of $1800 against Yellow Cab Co.; and in favor of Yellow Cab Co. against United States in sum of $1000, filed. (#7715.)

Jan. 4, Judgment in favor of Calvin Howey in $200 and in favor of Justine A. Howey in $1800 against Yellow Cab Co.; and in favor of Yellow Cab Co. and against United States in sum of $1000 filed. 1/5/49 Noted and Notice Mailed.

Jan. 11, Motion to set aside verdict and for judgment by United States filed. (#7715.)

Feb. 7 Argued sur motion of U. S. to set aside verdict. C. A. V.

Feb. 23, Order of Court, Kirkpatrick, J. denying motion of U. S. to set aside verdict filed. Noted and Notice mailed 2/23/49.

1949

Apr. 25, Notice of Appeal of Third-party defendant filed. (April 26, 1949 copies to Meyer, Lasch, Hanken & Poul, Esqs. and James J. Leyden, Esq.)

Apr. 25, Copy of Clerk's notice to U. S. Court of Appeals filed.

May 19, Plaintiffs' requests for findings, filed. (See C. A. 7715.)

May 19, Defendant's requests for findings, filed. (See C. A. 7715.)

36a *Plaintiffs' complaint*

(No. 7857)

1. Plaintiffs are citizens of and resident in the Commonwealth of Pennsylvania.

2. Defendant is a corporation organized and existing under the laws of the State of Delaware.

3. The matters in controversy herein, exclusive of interest and costs, exceed, with respect to each plaintiff, the sum of Three Thousand ($3,000.00) Dollars.

4. On December 1, 1946, Defendant owned, and by its servant, agent or employee, possessed, operated and controlled the taxicab involved in the occurrence hereinafter described.

5. On said date, plaintiffs were passengers for hire in said taxicab, which was proceeding in a southerly direction on Masher Street in the City of Philadelphia, and when it arrived at the intersection of Mascher Street with Ashdale Street, it was so negligently and carelessly operated and controlled that it came into contact and collision with a United States Mail truck, causin severe injuries to both of said plaintiffs.

6. As a result thereof, plaintiff Justine A. Howey suffered
37a a complete fracture through the distal end of the right fibula, contusions over the right parietal region, contusions over the right distal fibula, contusions and abrasions of the left knee, and a severe shock to her nervous system and other bodily injuries, which injuries have caused her great pain and suffering and have prevented her from attending to her usual and customary duties; her said hurts and injuries may be permanent in character.

7. As a further result of said occurrence plaintiff Justine A. Howey has incurred and may in the future incur, various expenses for medical and hospital care and medicines, in an effort to alleviate her said hurts and injuries.

8. Calvin Howey, one of the plaintiffs herein, sustained an extreme emotional upset and nervous shock, recurrent nosebleeds and tachycardia, he suffered an exacerbation and aggravation of a pre-existing irritable heart condition, and other severe bodily

injuries, which injuries have caused him great pain and suffering and have prevented him from attending to his usual occupational duties, all of which injuries may be permanent in character.

9. As a further result of said occurrence, plaintiff Calvin Howey has incurred and will incur in the future various expenses for medical care and medicines, and other expenses in an effort to alleviate his hurts and injuries.

10. As a result of the aforesaid injuries to Justine A. Howey, said Calvin Howey has been and in the future will be injuriously affected in his enjoyment of the society, companionship and services of his said wife.

38a 11. Wherefore plaintiff Calvin Howey claims of defendant the sum of $5,000.00 and plaintiff Justine A. Howey claims of defendant the sum of $15,000.00.

(S) AUGUSTUS F. DAIX, 3rd,
Attorney for Plaintiffs.

39a *Motion to bring in third-party defendant*

(No. 7857)

Defendant, Yellow Cab Company, moves for leave to make the United States of America a party to this action and that there be served upon such third-party defendant summons and third-party Complaint as set forth in Exhibit "A" hereto attached.

(S) JAMES J. LEYDEN,
Attorney for Defendant,
Yellow Cab Company,
1719 Packard Building, Philadelphia 2, Pa.

Order

And now, this 3rd day of November 1947, it appearing that the Complaint was served upon Yellow Cab Company on October 27, 1947, it is ordered that the clerk shall issue summons and third-party complaint to be served upon the said third-party defendant.

(S) MCGRANERY, *J.*

40a *Exhibit "A"*

SUMMONS

To the Above Named Third-Party Defendant:

You are hereby summoned and required to serve upon Augustus F. Daix, 3rd, Esquire, plaintiffs' attorney, whose address is 1034 Commercial Trust Building, Philadelphia 2, Pa., and James J.

Leyden, Esquire, attorney for Yellow Cab Company, defendant and third-party plaintiff, whose address is 1719 Packard Building, Philadelphia 2, Pa., an answer to the third-party complaint, copy of which is herewith served upon you, and an answer of the complaint of the plaintiff, copy of which is herewith served upon you, within 20 days after the service of this summons upon you exclusive of the day of service. If you fail to do so judgment by default will be taken against you for the relief demanded in the third-party complaint.

Dated:

[SEAL] ——, *Clerk of Court.*

THIRD-PARTY COMPLAINT

1. Plaintiffs, Calvin Howey and Justine A. Howey, have filed against defendant a complaint, copy of which is hereto attached as Exhibit "B."

41a 2. At the time and place of the accident referred to in plaintiffs' Complaint, the plaintiffs were passengers in the taxicab of the defendant, Yellow Cab Company.

3. At the time of the collision referred to in the Complaint, the mail truck owned by the United States of America was being operated by one Paul Henry Stephens, 2125 North 30th Street, Philadelphia, Pennsylvania, who was then and there acting within the scope of his office or employment as an employee of the Post Office Department of the United States of America.

4. For any injury or damages which plaintiffs may have suffered, the third-party defendant is or may be liable to the defendant or to the plaintiffs for all or part of the plaintiffs' claim against defendant.

Wherefore, Yellow Cab Company demands judgment against the third-party defendant, United States of America, for all sums that may be adjudged against defendant, Yellow Cab Company, in favor of plaintiffs, Calvin Howey and Justine A. Howey.

(S) JAMES J. LEYDEN,
Attorney for defendant,
Yellow Cab Company,
1719 Packard Building, Philadelphia 2, Pa.

42a *Exhibit "B"*

PLAINTIFFS' COMPLAINT

1. Plaintiffs are citizens of and residents in the Commonwealth of Pennsylvania.

2. Defendant is a corporation organized and existing under the laws of the State of Delaware.

3. The matters in controversy herein, exclusive of interest and costs, exceed, with respect to each plaintiff, the sum of Three Thousand ($3,000.00) Dollars.

4. On December 1st, 1946, Defendant owned, and by its servant, agent, or employee, possessed, operated, and controlled the taxicab involved in the occurrence hereinafter described.

5. On said date, plaintiffs were passengers for hire in the said taxicab, which was proceeding in a southerly direction on Masher Street in the City of Philadelphia, and when it arrived at the intersection of Mascher Street with Ashdale Street, it was so negligently and carelessly operated and controlled that it came into contact and collision with a United States Mail truck, causing severe injuries to both of said plaintiffs.

6. As a result thereof, plaintiff Justice A. Howey suffered a complete fracture through the distal end of the
43a right fibula, contusions over the right parietal region, contusions over the right distal fibula, contusions and abrasions of the left knee, and a severe shock to her nervous system and other bodily injuries, which injuries have caused her great pain and suffering and have prevented her from attending to her usual and customary duties; her said hurts and injuries may be permanent in character.

7. As a further result of said occurrence plaintiff Justine A. Howey has incurred and may in the future incur, various expenses for medical and hospital care and medicines, in an effort to alleviate her said hurts and injuries.

8. Calvin Howey, one of the plaintiffs herein, sustained an extreme emotional upset and nervous shock, recurrent nosebleeds and tachycardia; he suffered an exacerbation and aggravation of a pre-existing irritable heart condition, and other severe bodily injuries, which injuries have caused him great pain and suffering and have prevented him from attending to his usual occupational duties, all of which injuries may be permanent in character.

9. As a further result of said occurrence, plaintiff Calvin Howey has incurred and will incur in the future various expenses for medical care and medicines, and other expenses in an effort to alleviate his hurts and injuries.

10. As a result of the aforesaid injuries to Justine A.
44a Howey, said Calvin Howey has been and in the future will be injuriously affected in his enjoyment of the society, companionship and services of his said wife.

11. Wherefore plaintiff Calvin Howey claims of defendant the sum of $5,000.00 and plaintiff Justine A. Howey claims of defendant the sum of $15,000.00.

AUGUSTUS F. DAIX, 3rd,
Attorney for Plaintiffs.

45a *Third-party complaint*

(No. 7857)

1. Plaintiffs, Calvin Howey and Justine A. Howey, have filed against defendant a complaint, copy of which is hereto attached as Exhibit "B."

2. At the time and place of the accident referred to in plaintiffs' Complaint, the plaintiffs were passengers in the taxicab of the defendant, Yellow Cab Company.

3. At the time of the collision referred to in the Complaint, the mail truck owned by the United States of America was being operated by one Paul Henry Stephens, 2125 North 30th Street, Philadelphia, Pennsylvania, who was then and there acting within the scope of his office or employment as an employee of the Post Office Department of the United States of America.

4. For any injury or damages which plaintiffs may have suffered, the third-party defendant is or may be liable to the defendant or to the plaintiffs for all or part of the plaintiffs' claim against defendant.

Wherefore, Yellow Cab Company demands judgment against the third-party defendant, United States of America, for
46a all sums that may be adjudged against defendant, Yellow Cab Company, in favor of plaintiffs, Calvin Howey and Justine A. Howey.

(S) JAMES J. LEYDEN,
Attorney for defendant,
Yellow Cab Company,
1719 Packard Building, Philadelphia 2, Pa.

Exhibit "B"

PLAINTIFFS' COMPLAINT

1. Plaintiffs are citizens of and residents in the Commonwealth of Pennsylvania.

2. Defendant is a corporation organized and existing under the laws of the State of Delaware.

3. The matters in controversy herein, exclusive of interest and costs, exceed, with respect to each plaintiff, the sum of Three Thousand ($3,000.00) Dollars.

4. On December 1st, 1946, Defendant owned, and by its servant, agent, or employee, possessed, operated, and controlled the taxicab involved in the occurrence hereinafter described.

47a 5. On said date, plaintiffs were pasengers for hire in the said taxicab, which was proceeding in a southerly direction on Masher Street in the City of Philadelphia, and when

it arrived at the intersection of Mascher Street with Ashdale Street, it was so negligently and carelessly operated and controlled that it came into contact and collision with a United States Mail truck, causing severe injuries to both of said plaintiffs.

6. As a result thereof, plaintiff Justine A. Howey suffered a complete fracture through the distal end of the right fibula, contusions over the right parietal region, contusions over the right distal fibula, contusions and abrasions of the left knee, and a severe shock to her nervous system and other bodily injuries, which injuries have caused her great pain and suffering and have prevented her from attending to her usual and customary duties; her said hurts and injuries may be permanent in character.

7. As a further result of said occurrence plaintiff Justine A. Howey has incurred and may in the future incur, various expenses for medical and hospital care and medicines, in an effort to alleviate her said hurts and injuries.

8. Calvin Howey, one of the plaintiffs herein, sustained an extreme emotional upset and nervous shock, recurrent nosebleeds and tachycardia; he suffered an exacerbation and aggravation of a pre-existing irritable heart condition, and other severe bodily injuries, which injuries have caused him great pain and
48a suffering and have prevented him from attending to his usual occupational duties, all of which injuries may be permanent in character.

9. As a further result of said occurrence, plaintiff Calvin Howey has incurred and will incur in the future various expenses for medical care and medicines, and other expenses in an effort to alleviate his hurts and injuries.

10. As a result of the aforesaid injuries of Justine A. Howey, said Calvin Howey has been and in the future will be injuriously affected in his enjoyment of the society, companionship and services of his said wife.

11. Wherefore plaintiff Calvin Howey claims of defendant sum of $5,000.00 and plaintiff Justine A. Howey claims of defendant the sum of $15,000.00.

AUGUSTUS F. DAIX, 3rd,
Attorney for Plaintiffs.

49a *Answer of defendant, Yellow Cab Company*

(No. 7857)

I

FIRST DEFENSE

1–4. The averments in paragraphs 1, 2, and 4 of the Complaint are admitted. The averments contained in paragraph 3 of the Complaint are denied.

5. Defendant, Yellow Cab Company, admits that plaintiffs were passengers in its taxicab which was southbound on Mascher Street, and that at Ashdale Street defendant's taxicab and the United States mail truck were in collision. Defendant denies that its taxicab was operated in a negligent and careless manner, but on the contrary avers that its taxicab was then and there operated in a careful, lawful, and prudent manner with all due care under the circumstances.

6–10. In answer to the averments contained in paragraphs 6 to 10, inclusive, of the Complaint, defendant is without knowledge or information sufficient to form a belief as to the truth of said averments.

50a II

SECOND DEFENSE

Defendant's taxicab was operated in a careful, lawful, and prudent manner and any injury or damage sustained by the plaintiffs was the result of the negligent and careless manner in which the aforesaid United States mail truck was operated.

(S) JAMES J. LEYDEN,
Attorney for Yellow Cab Company.

51a *Motion to dismiss*

(No. 7857)

The United States of America, third-party defendant above, by Gerald A. Gleeson, Esquire, United States Attorney for the Eastern District of Pennsylvania, attorney for the third-party defendant, moves the Court as follows:

(1) To dismiss as third-party defendant the United States of America for the reason that the Federal Tort Claims Act under which the defendant attempts to join the United States of America as third-party defendant, does not authorize the maintenance of suits upon Derivative Claims.

(S) GERALD A. GLEESON,
United States Attorney.

52a *Order sur third-party defendant's motion to dismiss*

(No. 7857)

And now, to wit, this 31st day of March 1948, upon consideration of the foregoing motion, it is ordered that the same be and is hereby denied.

By the Court,

(S) KIRKPATRICK, *J.*

53a *Answer of third-party defendant*

(No. 7857)

Gerald A. Gleeson, United States Attorney for the Eastern District of Pennsylvania, and attorney for the United States of America, in the above-listed matter, avers the following in answer to Third-Party Complaint in said matter:

First Defense: The allegations of paragraphs 1, 2, and 3 of the Third-Party Complaint are admitted. The Third-Party Defendant denies each and every other allegation contained in said Third-Party Complaint.

Second Defense: The Complaint fails to state a claim against the Third-Party Defendant upon which relief can be granted.

Third Defense: Any injuries or damages which the Plaintiffs suffered were due to the negligent conduct of the Third-Party Plaintiff.

Wherefore, the Third-Party Defendant prays that the Third-Party Complaint be dismissed, with costs.

(S) GERALD A. GLEESON,
United States Attorney.

54a *Judgment*

(No. 7857)

Before KIRKPATRICK, *J.*

And now, to wit: January 4th, 1949, in accordance with the Opinion of the Court, it is ordered that Judgment be and is hereby entered in favor of Plaintiff Calvin Howey in the sum of Two Hundred and 00/100 ($200.00) Dollars, and in favor of Plaintiff Justine A. Howey in the sum of Eighteen Hundred and 00/100 ($1,800.00) Dollars, and against the Defendant and Third-Party-Plaintiff Yellow Cab Company, together with costs.

And it is further ordered that Judgment be and is hereby entered in favor of Defendant and Third-Party Plaintiff Yellow

Cab Company, and against the Third-Party Defendant, United States of America in the sum of One Thousand and 00/100 ($1,000.00) Dollars.

By the Court:

Attest:

(S) GILBERT W. LUDWIG,
Deputy Clerk.

55a *Order sur motion of third-party defendant to set aside verdict*

(No. 7857)

And now, to wit, this 24th day of February 1949, upon consideration of the foregoing motion, it is ordered that the same be and is hereby denied.

By the Court,

(S) KIRKPATRICK, *Ch. J.*

56a XI

Notice of appeal

(No. 7857)

Notice is hereby given that United States of America, Third-Party Defendant, hereby appeals to the United States Court of Appeals for the Third Circuit from the Order of the Court dated February 25, 1949, denying the Motion of United States of America, Third-Party Defendant, to set aside the verdict and/or judgment, in the above-entitled case.

(S) GERALD A. GLEESON,
United States Attorney.

57 27

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 9967

ROSE M. GUTMANN AND ROBERT HENRY GUTMANN

vs.

YELLOW CAB COMPANY, DEFENDANT AND THIRD-PARTY PLAINTIFF

vs.

UNITED STATES OF AMERICA, THIRD-PARTY DEFENDANT APPELLANT

No. 9966

CALVIN HOWEY AND JUSTINE A. HOWEY, HIS WIFE

vs.

YELLOW CAB COMPANY, DEFENDANT AND THIRD-PARTY PLAINTIFF

vs.

UNITED STATES OF AMERICA, THIRD-PARTY DEFENDANT APPELLANT

MOTION FOR LEAVE TO BRIEF AND ARGUE TOGETHER APPEALS IN THE CASES OF ROSE M. GUTMANN ET AL. AND CALVIN HOWEY ET AL. V. YELLOW CAB COMPANY, DEFENDANT AND THIRD-PARTY PLAINTIFF, V. UNITED STATES OF AMERICA, THIRD-PARTY DEFENDANT

The Motion of GERALD A. GLEESON, United States Attorney for the Eastern District of Pennsylvania and attorney for the above-listed Appellant, respectfully presents:

1. On the 25th day of April, A. D., 1949, the United States of America, Third-Party Defendant, filed a Notice of Appeal from the Order of the United States District Court for the Eastern District of Pennsylvania, dismissing Petitioner's Motion to set aside the verdict entered in the cases of Rose M. Gutmann, et al., and Calvin Howey, et al. v. Yellow Cab Company, Defendant and Third-Party Plaintiff v. United States of America, Civil Action Nos. 7715 and 7857, respectively.

2. The said cases involve suits of the Plaintiffs against the Yellow Cab Company, for damages arising out of a collision between a mail truck of the United States Government and a cab of the Yellow Cab Company, Defendant and Third-Party Plaintiff. Said Yellow Cab Company joined the United States of America as Third-Party Defendant in said proceedings.

3. All of the Plaintiffs in these actions were passengers in the said cab and the circumstances having to do with the liability of the Defendant and Third-Party Defendant are the same as regards each of the Plaintiffs.

4. The said cases were tried together in the United States District Court for the Eastern District of Pennsylvania by mutual consent of all the parties involved.

5. The same questions are involved in both appeals and any discussion of any one question will be equally applicable to the parties involved in the appeals.

6. None of the parties involved in these appeals object to the granting of this Motion.

(S.) GERALD A. GLEESON,
United States Attorney.

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 9967

ROSE M. GUTMANN AND ROBERT HENRY GUTMANN

vs.

YELLOW CAB COMPANY, DEFENDANT AND THIRD-PARTY PLAINTIFF

vs.

UNITED STATES OF AMERICA, THIRD-PARTY DEFENDANT APPELLANT

No. 9966

CALVIN HOWEY AND JUSTINE A. HOWEY, HIS WIFE

vs.

YELLOW CAB COMPANY, DEFENDANT AND THIRD-PARTY PLAINTIFF

vs.

UNITED STATES OF AMERICA, THIRD-PARTY DEFENDANT APPELLANT

ORDER

And now, this 21st day of June A. D., 1949, upon motion of GERALD A. GLEESON, United States Attorney for the Eastern District of Pennsylvania, and Attorney for the United States of America, Appellant in the above-listed cases, it is hereby

Ordered, adjudged and decreed that the cases of Rose M. Gutmann, et al. and Calvin Howey, et al. v. Yellow Cab Company,

defendant and Third-Party Plaintiff v. United States of America, Third-Party Defendant (Nos. 9967 and 9966, respectively), be jointly briefed and argued.

MARIS, *J.*

Endorsements: Motion to consolidate cases for briefing and argument and order granting motion. Received & filed June 21, 1949. Ida O. Creskoff, Clerk.

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 9967

ROSE M. GUTMANN AND ROBERT HENRY GUTMANN

vs.

YELLOW CAB COMPANY, DEFENDANT AND THIRD-PARTY PLAINTIFF

vs.

UNITED STATES OF AMERICA, THIRD-PARTY DEFENDANT APPELLANT

No. 9966

CALVIN HOWEY AND JUSTINE A. HOWEY, HIS WIFE

vs.

YELLOW CAB COMPANY, DEFENDANT AND THIRD-PARTY PLAINTIFF

vs.

UNITED STATES OF AMERICA, THIRD-PARTY DEFENDANT APPELLANT

STIPULATION

It is hereby stipulated and agreed among Milford J. Meyer, attorney for the Plaintiffs, Schnader, Harrison, Segal and Lewis, attorneys for the Defendant and Third-Party Plaintiff, and Gerald A. Gleeson, United States Attorney for the Eastern District of Pennsylvania, and attorney for the United States of America, Third-Party Defendant, in the above-listed cases, as follows:

(a) That the time for furnishing a statement to the Appellees of the contents of the Appellant's appendix is hereby extended until June 24, 1949;

(b) That the time for filing the Appellant's brief is hereby extended until July 2, 1949; and

(c) That the time for filing the briefs of the Appellees herein is hereby extended until September 3, 1949.

(S.) MILFORD J. MEYER
Attorney for Plaintiffs.

(S.) JAMES J. LEYDEN,
Schnader, Harrison, Segal and Lewis,
Attorneys for Defendant and Third-Party Plaintiff.

(S.) GERALD A. GLEESON,
United States Attorney.
Attorney for the United States
of America, Third-Party Defendant.

Approved: Maris, *J.*

6/21/49.

Endorsements: Stipulation to extend time for filing statement of contents of appendix to June 24, 1949; time for filing appellant's brief to July 2, 1949, and time for appellees' brief to September 3, 1949. Received & filed June 21, 1949. Ida O. Creskoff, Clerk.

W. A. Gay (MM)

Files Nos. 29693 & 29783

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 9967

ROSE M. GUTMANN AND ROBERT HENRY GUTMANN

vs.

YELLOW CAB COMPANY, DEFENDANT AND THIRD-PARTY PLAINTIFF

vs.

UNITED STATES OF AMERICA, THIRD-PARTY DEFENDANT-APPELLANT

No. 9966

CALVIN HOWEY AND JUSTINE A. HOWEY, HIS WIFE

vs.

YELLOW CAB COMPANY, DEFENDANT AND THIRD-PARTY PLAINTIFF

vs.

UNITED STATES OF AMERICA, THIRD-PARTY DEFENDANT-APPELLANT

MOTION FOR ADDITIONAL EXTENSION OF TIME

The Motion of GERALD A. GLEESON, United States Attorney for the Eastern District of Pennsylvania, and attorney for the above-listed Appellant, respectfully presents:

1. That on June 21, 1949, a Stipulation was entered into by the parties in the above-listed matter, providing an extension of time for the filing of Appellant's brief as of July 2, 1949.

2. That the aforesaid stipulating time for the filing of Appellant's brief as of July 2, 1949, was the result of inadvertent error of a typographical nature, it having been the intention of the stipulating parties to fix August 2, 1949, as the last date for filing Appellant's brief.

3. The said inadvertent error has been brought to the attention of all of the parties to the above-listed proceedings and as a result of discussion therewith and in view of the mutual conveniences involved, Movant requests the Court to authorize an extension of time for the filing of Appellant's brief until July 28, 1949.

4. None of the parties in the above-listed cases object to the granting of this Motion.

(S.) GERALD A. GLEESON,
United States Attorney.

W. A. Gay (MM)

Files Nos. 29693 & 29783

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IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 9967

ROSE M. GUTMANN AND ROBERT HENRY GUTMANN

vs.

YELLOW CAB COMPANY, DEFENDANT AND THIRD-PARTY PLAINTIFF

vs.

UNITED STATES OF AMERICA, THIRD-PARTY DEFENDANT-APPELLANT

No. 9966

CALVIN HOWEY AND JUSTINE A. HOWEY, HIS WIFE

vs.

YELLOW CAB COMPANY, DEFENDANT AND THIRD-PARTY PLAINTIFF

vs.

UNITED STATES OF AMERICA, THIRD-PARTY DEFENDANT-APPELLANT

ORDER

AND NOW, this 28th day of June, A. D., 1949, upon Motion of GERALD A. GLEESON, United States Attorney for the Eastern District of Pennsylvania, and attorney for the United States of America, Appellant in the above-listed cases, it is

ORDERED, ADJUDGED and DECREED that the time for the filing of the Appellant's brief in the above-listed cases is hereby extended until July 28, 1949.

MARIS, *J.*

Endorsements: Motion to extend time for filing appellant's brief to July 28, 1949 and Order granting motion. Received & Filed Jun. 28, 1949. Ida O. Croskoff, Clerk.

W. A. Gay (MM)

Files Nos. 29693 & 29783

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 9967

ROSE M. GUTMANN AND ROBERT HENRY GUTMANN

vs.

YELLOW CAB COMPANY

vs.

UNITED STATES OF AMERICA, THIRD-PARTY DEFENDANT-APPELLANT

No. 9966

CALVIN HOWEY AND JUSTINE A. HOWEY

vs.

YELLOW CAB COMPANY

vs.

UNITED STATES OF AMERICA, THIRD-PARTY DEFENDANT-APPELLANT

STIPULATION FOR FURTHER EXTENSION OF TIME FOR FILING APPELLANT'S BRIEF AND APPENDIX

It appearing to the undersigned that Appellant's Brief and Appendix are in the hands of the printer and that said printer will not be able to deliver the said Brief and Appendix to said Appellant before July 29, 1949, at best:

Now, therefore, it is stipulated and agreed among Milford J. Meyer, attorney for the plaintiffs; Schnader, Harrison, Segal and Lewis, attorneys for the defendant; and Gerald A. Gleeson, United States Attorney for the Eastern District of Pennsylvania, attorney for the United States of America, that the time for filing Appellant's Brief and Appendix be extended until August 1, 1949.

(S.) MILFORD J. MEYER,
(S.) JAMES J. LEYDEN,
Schnader, Harrison, Segal and Lewis.
(S.) GERALD A. GLEESON,
United States Attorney,
Attorney for the United States of America,
Third-Party Defendant-Appellant.

July 28, 1949.

Approved.

BIGGS,
Ch. Judge.

Endorsements: Stipulation to extend time for brief of United States of America to August 1, 1949, filed—Approved. Received & Filed Jul. 28, 1949. Ida O. Creskoff, Clerk.

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 9967

ROSE M. GUTMANN AND ROBERT HENRY GUTMANN

vs.

YELLOW CAB COMPANY

vs.

UNITED STATES OF AMERICA, THIRD-PARTY DEFENDANT-APPELLANT

No. 9966

CALVIN HOWEY AND JUSTINE A. HOWEY

vs.

YELLOW CAB COMPANY

vs.

UNITED STATES OF AMERICA, THIRD-PARTY DEFENDANT-APPELLANT

STIPULATION FOR EXTENSION OF TIME FOR FILING APPELLANT'S BRIEF

It appearing to the undersigned that the printer will be unable to complete appellee's brief before September 13, 1949;

Now, Therefore, it is stipulated and agreed among Milford J. Meyer, attorney for the plaintiffs; Schnader, Harrison, Segal and Lewis, attorneys for the defendant; and Gerald A. Gleeson, United States Attorney for the Eastern District of Pennsylvania, attorney for the United States of America, that the time for filing appellee's brief be extended until September 13, 1949.

(S.) MILFORD J. MEYER,
(S.) JAMES J. LEYDEN, JR.,
Schnader, Harrison, Segal and Lewis.
(S.) GERALD A. GLEESON.

Approved: September 1, 1949.
KALODNER, *J.*

Endorsements: Stipulation for extension of time for filing appellee's brief to Sept. 13, 1949—Approved. Received & Filed Sep. 1, 1949. Ida O. Cieskoff, Clerk.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 9966

CALVIN HOWEY AND JUSTINE A. HOWEY

vs.

YELLOW CAB COMPANY

vs.

UNITED STATES OF AMERICA, THIRD-PARTY DEFENDANT-APPELLANT

No. 9967

ROSE M. GUTMANN AND ROBERT HENRY GUTMANN

vs.

YELLOW CAB COMPANY

vs.

UNITED STATES OF AMERICA, THIRD-PARTY DEFENDANT-APPELLANT

Appeal from the United States District Court for the Eastern District of Pennsylvania

Argued December 6, 1949

Before BIGGS, *Chief Judge*, and O'CONNELL and KALODNER, *Circuit Judges*.

OPINION OF THE COURT—Filed April 27, 1950

By BIGGS, *Chief Judge*.

There are two appeals at bar. They can be disposed of appropriately in one opinion. Two suits were brought in the court below because the Gutmanns and the Howeys, the original plaintiffs, riding together as passengers, were injured in a collision which took place in Philadelphia on December 1, 1946 between a taxicab operated by Yellow Cab Company, the original defendant and the third-party plaintiff, and a mail truck operated by an employee of the United States, the third-party defendant. The Gutmanns and the Howeys sued Yellow Cab Company in the two suits referred to, jurisdiction being based on diversity and requisite amount. Thereafter, Yellow Cab filed a third-party complaint in each suit seeking

to enforce contribution from the United States.[1] See Rule 14(a), FRCP.

The United States, as third-party defendant, filed a motion to dismiss each suit on the ground that the Federal Tort Claims Act[2] "does not authorize the maintenance of suits upon derivative claims." These motions were denied and the United States then filed answers. The cases were consolidated for trial and evidence was presented by the plaintiffs, the original defendant and by the third-party defendant. The court below found Yellow Cab Company and the United States both guilty of negligence,[3] gave judgments against Yellow Cab in favor of the Gutmanns in the amount of $5,800, in favor of the Howeys in the sum of $2,000, and ordered one-half of the respective amounts to be paid by the United States by way of contribution. The United States then moved to set aside the verdicts on the same ground theretofore asserted, viz., that the FTCA did not authorize "derivative" suits against the United States. The District Court decided that the third-party actions could be maintained[4] and overruled the motions. The United States has appealed.

The United States in its briefs and argument in this court has treated the questions involved as if they were those only of joinder, i. e., as if the issue were: Does the FTCA permit the United States to be joined with Yellow Cab Company as a party defendant? In the court below, however, at least by way of pleading, emphasis seems to have been laid by the United States on the question as to whether actions for contribution, such as those asserted here against the United States, can be maintained under the applicable Pennsylvania statute, 12 P. S. Pa. § 2081. We will discuss the cases in the first instance as if the primary issue were one of joinder and then endeavor to dispose of the questions presented by the pending actions treating them as, what they in reality are, suits for contribution.

The primary question on the joinder phase of the appeals can be phrased as follows: Did the FTCA authorize joinder of the United States with another party-defendant or did the Act only authorize suits brought against the United States as the sole or

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[1] In the third-party complaints Yellow Cab demands judgment against the United States "for all sums that may be adjudged against defendant, Yellow Cab Company, in favor of plaintiffs . . .".

[2] 28 U. S. C. (1946 ed.) Sections 921-946. Most of the provisions of what was the FTCA are now sown throughout revised Title 28. See "Table 1", an addendum to revised Title 28, United States Code, "Judiciary and Judicial Procedure", 28 U. S. C. A., as appears.

[3] The opinion was not reported for publication.

[4] The opinion was not reported for publication.

single defendant? Carefully balancing the language of the statute some courts have held that the United States may be joined with another defendant or defendants. See for example Englehardt v. United States (D. C. Md.) 69 F. Supp. 451. Subrogation against the United States also has been permitted. See United States v. Aetna Surety Co., 338 U. S. 366, referred to hereinafter, and the pertinent cases cited therein. Other courts have taken the view that the FTCA authorized suits against the United States only when it was the sole defendant, basing their conclusions in large part on legislative history. See Drummond v. United States (D. C. Va.) 78 F. Supp. 730 and Uarte v. United States (D. C. Cal.) 7 F. R. D. 705.[5]

At the time of the occurrence of the accident the provisions of revised Title 28, United States Code, were not in effect, the effective date of revised title being September 1, 1948. See Section 38 of the Act of June 25, 1948, c. 646, 62 Stat. 992. The complaint was filed in the Gutmann case (Civil Action No. 7715 in the court below) on September 9, 1947, and in the Howey case (Civil Action No. 7859 in the court below) on October 27, 1947. Judgments were entered in both cases in the court below on January 4, 1949, the adjudications therefore being made after the effective date of revised Title 28. Section 39 of the Act of June 25, 1948, provides that "The sections or parts . . . of . . . [the] Statutes at Large enumerated in the following schedule are hereby repealed. Any rights or liabilities now existing under such sections or parts thereof shall not be affected by this repeal." It appears that the FTCA, as amended, was repealed by the Act of June 25, 1948. See the schedule referred to in Section 39, 62 Stat. 1008. It would follow that if a loss of rights would occur if the provisions of revised Title 28 were to be applied, the provisions of the FTCA as they existed prior to the effective date of the revised title must be deemed to be governing. See note 6 cited to the text in Hoiness v. United States, 335 U. S. 297, 301. In United States v. Aetna Surety Co., 338 U. S. at p. 370, at note 5 cited to the text of Mr. Chief Justice Vinson's opinion, reference is made to what may be regarded properly as the key section of the FTCA, viz., Section 410(a), Section 931 of Title 28 U. S. C. (1946 ed.), and it is stated that "This section is now divided, and, with immaterial changes, appears in [revised Title] 28 U. S. C., Sections 1346(b) and 2674."

In the cited case the Supreme Court was considering the effect

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[5] On this general subject see the note and the collection of authorities therein, 1 A. L. R. 2d 222, 230, 239 *et seq.* See also 35 Georgetown Law Journal, 1; 56 Yale Law Review, 534 at 554 *et seq.* and 62 Harvard Law Review, 321 *et seq.*

of R. S. 3477, the "anti-assignment" statute, 31 U. S. C. A. Section 203, and held that an insurance company could bring an action under the FTCA in its own name against the United States upon a claim to which it had become subrogated by payment to an insured who would have been able to bring such an action. The issue with which we are concerned in the instant case was not precisely in focus in the Aetna Surety Co. decision. We state this because it seems to us possible that the language of Section 1346(b) of revised Title 28, United States Code, may be somewhat narrower in effect than the pertinent portion of Section 410(a) of the FTCA, 28 U. S. C. (1946 ed.) Section 931(a). We need not determine this question, however, for it is clear that the rights of the parties accrued before September 1, 1948; and, if the language of Section 1346(b) of revised Title 28 be narrower in scope, the instant cases must be determined under the FTCA as it existed prior to the date last stated. On the other hand if the words of Section 1346(b) do not effect any limitation of the rights of the parties we need not consider them here for it is clear that they work no enlargement. Moreover, the FTCA as it existed prior to September 1, 1948, must be deemed to give the true congressional intent in respect to the rights of parties under the FTCA prior to the effective date of revised Title 28. We therefore shall consider the law as it existed prior to revised Title 28 and thus decide the instant cases.

The proponents of the United States as the sole or single party point out that Section 410(a) [6] of the FTCA, now 28 U. S. C.

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[6] Section 410(a) was as follows:

"Subject to the provisions of this title, the United States district court for the district wherein the plaintiff is resident or wherein the act or omission complained of occurred, including the United States district courts for the Territories and possessions of the United States, sitting without a jury, shall have exclusive jurisdiction to hear, determine, and render judgment on any claim against the United States, for money only, accruing on and after January 1, 1945, on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States if a private person, would be liable to the claimant for such damage, loss, injury, or death in accordance with the law of the place where the act or omission occurred. Subject to the provisions of this title, the United States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent as a private individual under like

Sections 1346(b), 2402, and 2674, conferred exclusive jurisdiction upon United States district courts "sitting without a jury" to hear and determine claims "on account of personal injury" caused by the negligent act of an employee of the Government, and that this presupposes a trial with the United States as the sole defendant since the Seventh Amendment requires, unless waived, a jury trial for any other defendant. The proponents of the theory that the United States may be joined as a defendant argue that because Section 410 (a) provided that the Government should be liable "under circumstances where the United States if a private person, would be liable to the claimant for such damage . . . in accordance with the law of the place where the act . . . occurred" and also that ". . . the United States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances . . .", Congress had made the rights and liabilities of the United States equivalent to those of a private litigant and such a waiver of immunity by the sovereign permits its joinder. In modern practice juries very frequently are waived in trials in United States district courts. Had a jury been insisted on by the private defendant in the instant case there was no valid reason why the trial judge and the jury respectively should not have determined the liability of the United States and that of the private defendant. Cf. Elkins v. Nobel, (D. C. N. Y.) 1 F. R. D. 357.

The United States asserts that since Section 410 (b) of the FTCA, now 28 U. S. C. Section 2676, provided that a judgment against the United States in a Section 410 (a) action should constitute a complete bar to any suit brought by the claimant against the employee of the Government whose negligence gave rise to the claim, the negligent government employee could not have been joined as a third-party defendant with the United States as a third-party defendant. Cf. Dickens v. Jackson (D. C. N. Y.) 71 F. Supp. 753. But this contention carries little weight respecting joinder or nonjoinder of the United States though as a practical matter it has served to eliminate government employees as defendants in most suits.

In some of the cases deciding in favor of non-joinder much is made of the fact that Section 412 of the FTCA, now 28 U. S. C. Sections 1291, 1504, 2110, provided an alternative appeal from a judgment of a United States district court either to the appropriate

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circumstances, except that the United States shall not be liable for interest prior to judgment, or for punitive damages. Costs shall be allowed in all courts to the successful claimant to the same extent as if the United States were a private litigant, except that such costs shall not include attorneys' fees."

court of appeals or to the Court of Claims of the United States. Section 412 provided, if the appeal was to the Court of Claims, that the notice of appeal, required by Rule 73, FRCP, should have endorsed upon it the written consent of all the appellees to the appeal as taken. Putting aside questions as to the power of Congress to have provided for an appeal from an Article III court to an Article IV court or to have conferred upon the Court of Claims of the United States in the terms of Section 412 ". . . the same powers and duties [respecting appeals] as those conferred on a . . . court of appeals", it can be cogently argued that since the United States can be the only defendant in a suit in the Court of Claims, it must have been the congressional intent that the United States should be the sole appellant or the sole appellee in a suit arising under the FTCA for otherwise the Court of Claims might have been compelled to deal with the rights and obligations of the United States as a defendant in conjunction with those of other defendants, a course theretofore prohibited to it. This argument has weight.[7] Cf. §§ 1504 and 2106 of revised Title 28, United States Code.

Section 420 provided a period of one year for bringing suit on account of personal injuries. Cf. 28 U. S. C. Section 2401(b), as amended. Many of the statutes of limitations of the States governing suits for personal injuries are of longer duration. In Pennsylvania the limitation upon suits for personal injuries is two years. See 12 P. S. Pa. § 34. It can be argued therefore that Congress did not intend to permit joinder because a private defendant might be kept in the suit while the United States was eliminated. Such a result would be somewhat anomalous but as was pointed out by Judge Yankwich in 9 F. R. D. at pp. 153-4, the FTCA was a statute of *creation*.

Section 422, now 28 U. S. C. Section 2678, provided for the payment of attorney's fees by the United States in the cases of successful litigants and prescribed criminal penalties for any attorney whose compensation exceeded 20% of the sum recovered under the FTCA. It is said that joinder of the United States with a private defendant would have rendered such a provision inoperable. This position is untenable.

There are other considerations advanced by Yellow Cab or in the decided cases, which require discussion. Section 411, now

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[7] No serious question of constitutionality can arise in the setting of the cases at bar. Cf. National Ins. Co. v. Tidewater Co., 337 U. S. 582. The appeal to the Court of Claims is a permissive one and the cases were brought here and not to the Court of Claims.

repealed in pertinent part,[8] provided expressly that the practice and procedure under the FTCA should be in accordance with the Federal Rules of Civil Procedure. This was a shotgun proviso, however, and though it is urged, as is the fact, that Rule 20 (a) authorizes joinder, we cannot find this very persuasive.

A cogent argument in favor of joinder, however, lies in the fact that while Section 421, now 28 U. S. C. Section 2680, set out twelve exemptions from the operation of the FTCA, not one of them prohibited joinder or made any reference to subrogation or contribution. Cf. Old Colony Ins. Co. v. United States (6 Cir.) 168 F. 2d 931.

Though the legislative history of the FTCA is inconclusive, it will be observed that the report of the Committee on the Judiciary of the House of Representatives dated November 26, 1945, H. Rept. 1287, 79th Cong., 1st Sess., accompanying H. R. 181, entitled "Tort Claims Against the United States", stated respecting Section 301 of that bill, substantially the equivalent in language of Section 410 of the FTCA, that "It is intended that the district courts in exercising jurisdiction . . . shall exercise essentially the same type of jurisdiction as district courts exercise concurrently with the Court of Claims of the United States under the Tucker Act . . . The bill therefore does not permit any person to be joined as a defendant with the United States . . ." It should be noted that S. Rept. 1400, the report of the Special Committee on the Reorganization of Congress, accompanying S. 2177, 79th Cong. 2d Sess. which became Public Law No. 601, the Legislative Organization Act, Title IV of which is the FTCA, contained no such statement. It may be argued with some plausibility, therefore, that the earlier intention of the members of the Judiciary Committee of the House of Representatives to eliminate joinder of the United States was not insisted upon. In referring to the Federal Tort Claims title of S. 2177, S. Rept. 1400 stated that this title was almost identical with that which was incorporated in H. R. 181, with the exception that the $10,000 limitation had been removed. The report said respecting Section 410 of the FTCA, which was the same as Section 301 of H. R. 181: "The trial will be without a jury as is now the case in suits under the Tucker Act. The liability of the United States will be the same as that of a private person under like circumstance, in accordance with the local law, except that no punitive damages and

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[8] See Schedule of Laws Repealed, following Section 39 of the Act of June 25, 1948, revised Title 28, United States Code, "Judiciary and Judicial Procedure," 28 U. S. C. A. as appears. See also S. Rept. 1559, 80th Cong., 2d Sess., accompanying H. R. 3214, in which the view was taken that the provision contained in Section 411 relating to the Federal Rules of Civil Procedure was unnecessary.

no interest prior to judgment may be recovered." From the foregoing it may be concluded that it was not the intention of Congress to cause the United States to be treated in a different manner from any private litigant in respect to joinder and that the feature of the Tucker Act foremost in the mind of Congress was trial to the court without a jury.[9]

Emphasis may also properly be laid on the practice in admiralty under Section 3 of the Suits in Admiralty Act, 46 U. S. C. A. Section 743, where the language employed is very similar to that contained in Section 410 (a) of the FTCA.[10] There is no doubt that the United States can be impleaded by the respondent under

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[9] The argument of the United States respecting legislative history may be summed up as follows:

The Federal Tort Claims Act was included in Title IV Public Law No. 601, enacted by the 2nd Session of the 79th Congress. H. R. 7236, introduced in the 76th Congress 1st Sess., S. 2221 (passed by the Senate) and H R. 6463 introduced in the 77th Congress 2nd Sess., S. 1114 in the 78th Congress 1st Sess., and H. R. 181 in the 79th Congress are to some degree progenitors of the present Act. Section 403 of H. R. 6463 read as follows: "If the damage, loss, injury, or death with respect to which a claim is made pursuant to this Act is caused under circumstances creating a legal liability on the part of some person other than an employee of the Government to pay damages therefor, jointly or severally with the United States, the award or judgment against the United States shall be only for the pro rata share of the damages in proportion to the number of parties so jointly or severally liable." Section 403 of S. 1114 contained substantially the same language. The United States points out that when the FTCA was enacted the language expressly providing for joinder and contribution was omitted. This, it is contended, demonstrates that Congress did not intend that joinder should be made or contribution should be effected.

We do not find this argument persuasive though, of course, it carries some weight. We adhere to the view that if Congress had intended to prohibit joinder it would have done so by express mandate in the statute or by unmistakable legislative history in the reports accompanying the legislation as it was enacted. See the rules for the construction of legislative history as laid down by the Supreme Court of the United States by Mr. Justice Pitney in Duplex Co. v. Deering, 254 U. S. 443, 474-477.

[10] Section 743 in pertinent part read as follows:

"Such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties. . . ."

Admiralty Rule 56. See Brady v. Roosevelt S. S. Co., 317 U. S. 575, and Hust v. Moore-McCormack Lines, 328 U. S. 707.

Upon consideration of all of these factors we conclude that the FTCA must be construed to have authorized suits against the United States not only when the United States was the sole or single defendant but also when the United States was joined with another defendant or defendants. Though there is room for doubt our conclusion expresses our best judgment in respect to the issue involved. But can contribution be exacted from the United States under the FTCA in the cases at bar? This is a closely allied question.

Contribution is a right arising under the substantive law of the States. The pertinent Pennsylvania statute, as we have said, is the Act of June 24, 1939, P. L. 1075, 12 P. S. Pa. § 2081, which provides that "Contribution shall be enforceable among those who are jointly or severally liable for a tort where, as between them such liabilities are either all primary or all secondary." See Fisher v. Diehl, 156 Pa. Super. 476, 482, 40 A. 2d 912, 916, and Kravas v. Great Atlantic & Pacific Tea Co. (D. C. Pa.) 28 F. Supp. 66. The United States has been found equally guilty with Yellow Cab by the court below. It would follow that if the United States were a private party it would be primary liable as a joint tort-feasor and contribution could be enforced against it by Yellow Cab under the Pennsylvania statute cited. But could contribution from the sovereign to Yellow Cab fall within the purview of the FTCA? Did the waiver of immunity by the sovereign go so far? We think that it did.

The provisions of Section 410 (a) [11] seem conclusive in this connection for that section conferred exclusive jurisdiction upon the United States district courts to render judgment on any claim against the United States "on account of personal injury . . .". Note that the jurisdiction of the United States district courts was not limited to the adjudication of *claims for damages*. The word "claimant" used in the statute was employed to designate any person who might assert the claim and was *not* limited to one who

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[11] Cf. the pertinent provisions of Section 1346(b) of revised Title 28, United States Code, as follows: ". . . the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." Cf. note 6, *supra*.

had sustained damage to his property or injury to his person. In other words a "claimant" in the eye of the statute was any one who had a claim against the United States *on account* of personal injury or damage to property. Broader phrases or words more likely to embrace liability generally are difficult to imagine. A joint tort-feasor would have a claim on account of personal injury as would a subrogee. This point was settled by the decision of the Supreme Court in United States v. Aetna Surety Co., *supra*. It would seem to have been the intention of Congress to put the United States on a precise parity with the private litigant in suits cognizable under the FTCA. See Moore's Federal Practice, 2nd ed., Vol. 3, pp. 2730-2739.

The judgments in the instant cases are cast in proper form for it will be observed that at each number (Civil Action No. 7715 in the case of the Gutmanns, and Civil Action No. 7857 in the case of the Howeys) the judgments were first found against Yellow Cab and the court then ordered that judgments be entered in favor of Yellow Cab and against the United States for one-half of the amounts. The Pennsylvania law and practice do not require the existence of a joint judgment before a claim for contribution can be enforced against the joint tort-feasor.[12] The Pennsylvania third-party practice is within the purview of Rule 14(a), FRCP. Separate suits could have been filed against the United States by Yellow Cab, the United States being the sole defendant, and judgments of contribution could thus have been obtained by Yellow Cab. The principle of United States v. Sherwood, 312 U. S. 584, 587-8, arising under the Tucker Act, would be inapplicable even by way of analogy for such judgments would have been obtained in suits in which the United States was the sole defendant. In the instant cases the learned trial judge could have terminated the proceedings after judgments had been rendered in favor of the Gutmanns and the Howeys against Yellow Cab, and then could have proceeded to give separate trials to the United States on the issue of contribution. Surely the stricture of the Sherwood case, even if it were deemed to be applicable to cases involving joinder of the United States arising under the FTCA, would not serve to require second, separate trials with the United States as the sole defendant, the issue being one of contribution, for such second, separate trials would embrace the same evidence as that already received and would be conducted before the same judge. Cf. United States v. Aetna Surety Co., *supra*.

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[12] Note that in the case of Fisher v. Diehl, 156 Pa. Super. 476, 40 A. 2d 912, the wife could not sue the husband for negligent personal injuries. Therefore, a joint judgment could not have been obtained by her.

It is urged that somehow and in some way there might be a difference in quality, and therefore in result, in a trial in which the liability of two joint tort-feasors is adjudicated as compared to a trial in which the right of one tort-feasor to exact contribution from another is determined even if the trials were to be proceeded with in the same court and before the same judge. This argument would seem to be based on the proposition that the liability of the United States would somehow be enlarged, or it would be placed in an invidious position because its blameworthiness is determined in a suit with that of another defendant. Such an argument seems divorced from reality. But in any event the short answer to it is that the doctrine of the Sherwood case is inapplicable by way of analogy to the instant cases for it was apparently the intention of Congress to cause the United States to stand in equality with the private litigant in suits arising under the FTCA.

The judgments of the court below will be affirmed.

Judge O'Connell heard the argument and participated in the consideration of these appeals but died before the opinion was filed.

A true Copy:

Teste:

_____,

Clerk of the United States Court of Appeals for the Third Circuit.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 9967

ROSE M. GUTMANN AND ROBERT HENRY GUTMANN

vs.

YELLOW CAB COMPANY

vs.

UNITED STATES OF AMERICA, APPELLANT

On Appeal from the United States District Court for the Eastern District of Pennsylvania

Present: BIGGS, *Chief Judge*, and KALODNER, *Circuit Judge*.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

Attest:

IDA O. CRESKOFF,
Clerk.

April 27, 1950.

Endorsements: Judgment affirming judgment of District Court. Received & Filed Apr. 27, 1950. Ida O. Creskoff, Clerk.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 9966

CALVIN HOWEY AND JUSTINE A. HOWEY

vs.

YELLOW CAB COMPANY

vs.

UNITED STATES OF AMERICA, APPELLANT

On Appeal from the United States District Court for the Eastern District of Pennsylvania

PRESENT: BIGGS, *Chief Judge*, and KALODNER, *Circuit Judge*.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pensylvania and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

Attest:

IDA O. CRESKOFF,
Clerk.

April 27, 1950.

Endorsements: Judgment affirming judgment of District Court. Received & Filed Apr. 27, 1950. Ida O. Creskoff, Clerk.

UNITED STATES OF AMERICA, ss:

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To the Honorable, the Judges of the United States District Court for the Eastern District of Pennsylvania.

GREETING:

WHEREAS, lately in the United States District Court for the Eastern District of Pennsylvania, before you or some of you, in a cause between Rose M. Gutmann and Robert Henry Gutmann, Plaintiffs and Yellow Cab Company, Defendant and Third-Party Plaintiff, (Appellee)—Civil Action No. 7715—a judgment was entered in the District Court on February 25, 1949, which judgment is of record in the office of the clerk of the said District Court, to which reference is hereby made, and the same is hereby expressly made a part hereof, as by the inspection of the record of the said District Court, which was brought into the United States Court of Appeals for the Third Circuit by virtue of an appeal by United States of America agreeably to the Act of Congress, in such case made and provided, more fully and at large appears.

AND WHEREAS, the said cause came on to be heard before the said United States Court of Appeals for the Third Circuit, on the said record, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

April 27, 1950.

YOU, THEREFORE, ARE HEREBY COMMANDED that such proceedings be had in said cause, in conformity with the opinion and judgment of this court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Signed and sealed this 16th day of May in the year of our Lord one thousand nine hundred and fifty.

IDA O. CRESKOFF,
Clerk, United States Court of Appeals for the Third Circuit.

Costs—

Clerk's Fee	$.....
Printing	$.....
.....	$.....
Total	$.....

Endorsed: Civil Action No. 7715, No. 9967, Rose M. Gutmann and Robert Henry Gutmann vs. Yellow Cab Company vs. United

States of America, Appellant. Copy Mandate, received & filed May 16, 1950. Ida O. Creskoff, Clerk.

UNITED STATES OF AMERICA, ss:

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To the Honorable, the Judges of the United States District Court for the Eastern District of Pennsylvania.

GREETING:

WHEREAS, lately in the United States District Court for the Eastern District of Pennsylvania, before you or some of you, in a cause between Calvin Howey and Justine A. Howey, his wife, Plaintiffs and Yellow Cab Company, Defendant and Third-Party Plaintiff, (Appellee) and United States of America, Third-Party Defendant, (Appellant)—Civil Action No. 7857—a judgment was entered in the District Court on February 25, 1949, which judgment is of record in the office of the clerk of the said District Court, to which reference is hereby made, and the same is hereby expressly made a part hereof, as by the inspection of the record of the said District Court, which was brought into the United States Court of Appeals for the Third Circuit by virtue of an appeal by United States of America agreeably to the Act of Congress, in such case made and provided, more fully and at large appears.

AND WHEREAS, the said cause came on to be heard before the said United States Court of Appeals for the Third Circuit, on the said record, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

April 27, 1950.

YOU, THEREFORE, ARE HEREBY COMMANDED that such proceedings be had in said cause, in conformity with the opinion and judgment of this court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Signed and sealed this 16th day of May in the year of our Lord one thousand nine hundred and fifty.

IDA O. CRESKOFF,
Clerk, United States Court of Appeals for the Third Circuit.

Costs—

Clerk's Fee ..... $.....
Printing ..... $.....
..... $.....

Total $.....

Civil Action 7857, No. 9966, Calvin Howey and Justine A. Howey vs. Yellow Cab Company vs. United States of America, Appellant. Copy Mandate. Received & filed May 16, 1950. Ida O. Creskoff, Clerk.

I, Ida O. Creskoff, Clerk of the United States Courts of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original Appendices of Appellant, and proceedings in this court in the cases of Rose M. Gutmann and Robert Henry Gutmann vs. Yellow Cab Company vs. United States of America, appellant, No. 9967 and Calvin Howey and Justine A. Howey vs. Yellow Cab Company vs. United States of America, appellant, No. 9966, on file, and now remaining among the records of the said Court, in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 15th day of June in the year of our Lord one thousand nine hundred and fifty, and of the Independence of the United States the one hundred and seventy-fourth.

[SEAL.]

IDA O. CRESKOFF,
Clerk of the U. S. Court of Appeals, Third Circuit.

U. S. GOVERNMENT PRINTING OFFICE: 1950 892201 744

80 Supreme Court of the United States

Order allowing certiorari

Filed October 9, 1950

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted. The case is transferred to the summary docket and assigned for argument immediately following No. 204, Capital Transit Co. vs United States of America.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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Nos. 218

In the Supreme Court of the United States

OCTOBER TERM, 1950

UNITED STATES OF AMERICA, PETITIONER

v.

YELLOW CAB COMPANY

UNITED STATES OF AMERICA, PETITIONER

v.

YELLOW CAB COMPANY

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. —

UNITED STATES OF AMERICA, PETITIONER

v.

YELLOW CAB COMPANY

No. —

UNITED STATES OF AMERICA, PETITIONER

v.

YELLOW CAB COMPANY

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the United States, prays that writs of certiorari issue to review the judgments of the United States Court of Appeals for the Third Circuit, entered in the above-entitled cases on April 27, 1950.

OPINIONS BELOW

The opinions of the United States District Court for the Eastern District of Pennsylvania on the pleadings and proof (R. 24-25) and on the motion of the United States to set aside the verdict (R. 28-31) are not reported. The opinion of the United States Court of Appeals for the Third Circuit (R. 65-75) is reported at 181 F. 2d 967.

JURISDICTION

The judgments of the Court of Appeals were entered on April 27, 1950 (R. 75, 76). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Tort Claims Act authorizes impleading the United States as a third-party defendant.

2. Whether the Tort Claims Act subjects the United States to liability for contribution to a joint tortfeasor.

STATUTE AND RULE INVOLVED

Pertinent portions of the Federal Tort Claims Act, in its original form (60 Stat. 842, 28 U. S. C., 1946 ed., 931 *et seq.*),[1] and Rule 14(a) of the Fed-

[1] Under the revision of the Judicial Code (Act of June 25, 1948, 62 Stat. 869), the provisions of the Tort Claims Act now appear in Sections 1291, 1346(b), 1402, 1504, 2110, 2401, 2402, 2411, 2412, and 2671-2680 of Title 28, United States Code. Since the accident involved in this litigation occurred before the effective date (September 1, 1948, see Section 38 of the Act of June 25, 1948, 62 Stat. 992) of the new Judicial

eral Rules of Civil Procedure are set forth in Appendix A, *infra*, pp. 10-13.

STATEMENT

These two actions arose out of a collision on December 1, 1946, at a street intersection in Philadelphia, Pennsylvania, between a taxicab, owned by respondent and driven by its employee, and a United States mail truck driven by a Government employee (R. 5, 12, 15, 19, 36, 45, 49, 53). The original plaintiffs were passengers in the taxicab at the time of the collision. Predicating federal jurisdiction upon diversity of citizenship and amounts in controversy exceeding $3,000, they brought suit against respondent in the United States District Court for the Eastern District of Pennsylvania, alleging that they had been injured as a result of the negligence of respondent's driver (R. 5, 36). Respondent sought and obtained leave to implead the United States as a third-party defendant in both actions, claiming that the United States was or might be liable to it for all or part of the plaintiffs' claims (R. 7, 9, 39, 41).

Following denial of motions by the Government to dismiss the third-party complaints on the ground that they asserted derivative claims unauthorized

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Code, we assume with the court below (R. 68) that the original formulation of the Tort Claims Act is applicable here. As indicated below, however (see footnote 6, *infra*, p. 7), we believe that the slight differences in language between the original Act and the sections of Title 28 which reenact it are immaterial to the questions presented herein.

by the Tort Claims Act, the cases were consolidated and tried to the court without a jury (R. 17, 18, 51, 52, 24-25, 28). The court concluded that both the taxicab driver and the mail truck driver had been negligent, awarded judgments totaling $7,800 in favor of the plaintiffs against respondent, and entered judgments for one-half of this amount, $3,900, in favor of respondent against the United States (R. 24-25, 26, 51). The Government, contending that the court lacked jurisdiction over the United States as third-party defendant and that the third-party complaints failed to state claims upon which relief could be granted, moved to have the judgments set aside (R. 27). This motion was denied, the court holding that the Tort Claims Act authorized both joinder of the United States as a third-party defendant and the assertion against the United States by a joint tortfeasor of the substantive right to contribution recognized by state law (R. 28-31).

On appeal, the judgments of the district court were affirmed (R. 75, 76). First, the court below held, while there is "room for doubt," the Tort Claims Act "must be construed to have authorized suits against the United States not only when the United States was the sole or single defendant but also when the United States was joined with another defendant or defendants." (R. 73). Secondly, the court concluded, the waiver of immunity in Section 410(a) of the Tort Claims Act to suits

"on account of personal injury" was broad enough to include consent to suits for contribution (R. 73-75).

REASONS FOR GRANTING THE WRIT

The holding below that the Tort Claims Act permits joinder of the United States as a third-party defendant in a suit between private litigants is in direct conflict with the decision of the Court of Appeals for the District of Columbia Circuit in *Capital Transit Co.* v. *United States,* No. 10467, decided June 5, 1950.[2] We believe that the court below has erred and that the construction of the Tort Claims Act announced in the *Capital Transit* decision is correct.[3] Of greater significance at the moment, however, is the existence of this conflict of decisions on an issue of general importance in the administration of the Tort Claims Act. We submit that both the question of joinder of the United States and the "closely allied question" (opinion below, R. 73), whether the United States is liable for contribution under the Tort Claims Act, merit review by this Court.

1. In *Capital Transit Co.* v. *United States, supra,* the Court of Appeals for the District of Columbia

[2] The Capital Transit Company has filed a petition for a writ of certiorari to review this decision. *Capital Transit Company* v. *United States,* No. 204, this Term. For the reasons set forth herein, the Government will not oppose the granting of the writ in that case.

[3] In Appendix B, *infra,* pp. 13-24, we have printed for the convenience of the Court the opinion of the Court of Appeals for the District of Columbia Circuit in *Capital Transit Co.* v. *United States, supra.* At least for the purpose of this petition,

Circuit, expressly recognizing (Appendix B, *infra*, p. 16) the conflict with the instant decision, held that the Tort Claims Act does not authorize impleader of the United States as a third-party defendant. Prior to the instant decision, the District of Columbia Court had already ruled on substantially the same problem when it held, in *Sappington* v. *Barrett*, 182 F. 2d 102, decided April 14, 1950, that a plaintiff in a tort action could not join the United States as a co-defendant. For, as both courts of appeals have indicated, the results of involving the United States as a defendant in a suit between private litigants are essentially the same whether the joinder is effected by the original plaintiff or by the private defendant suing as third-party plaintiff.[4]

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that opinion amply demonstrates, we believe, the incorrectness of the decision below.

[4] If the United States and a private defendant are joined by the plaintiff, they may assert cross-claims against each other. Fed. R. Civ. P. 13(g). If the joinder results from a third-party complaint, the original plaintiff and third-party defendant may assert claims against each other. Fed. R. Civ. P. 14(a), *infra*, pp. 12-13. Thus, however the joinder is initially accomplished, it tends ultimately to litigation in the same suit of (1) claims between original plaintiff and private defendant, (2) claims between original plaintiff and United States, and (3) claims between private defendant and United States.

Quite properly, therefore, both the court below and the District of Columbia Circuit have treated the two procedures as being substantially identical so far as the permissibility of their use against the United States under the Tort Claims Act is concerned. The court below states as its conclusion (R. 73) "that the FTCA must be construed to have authorized suits against the United States not only when the United States was the sole or single defendant but also when the United States was joined with another defendant or defendants." The District of Co-

The conflicting decisions of the two circuits deal broadly, therefore, with a problem growing out of a constantly recurring situation—an accident involving the Government and one or more private parties as alleged joint tortfeasors. The question whether the United States may be joined with other defendants in such circumstances has been presented in a number of cases under the Tort Claims Act and has produced a sharp divergence of views among the district courts as well as in the court of appeals decisions discussed here.[5] A ruling by this Court on this problem, which may be expected to continue to arise in the future, will forestall extensive litigation which must otherwise burden both the Government and private litigants.[6]

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lumbia Circuit, in *Sappington* v. *Barrett*, *supra*, wrote a *per curiam* opinion stating that the reasons for its conclusion would "be set forth in full in an opinion to be published at a later date," and supplied the promised explication in *Capital Transit Co.* v. *United States*, *supra*. See 182 F. 2d, at 103.

[5] Joinder denied: *Uarte* v. *United States*, 7 F.R.D. 705 (S.D. Cal.); *Drummond* v. *United States*, 78 F. Supp. 730 (E.D. Va.); *Donovan* v. *McKenna*, 80 F. Supp. 690 (D. Mass.); *Prechtl* v. *United States*, 84 F. Supp. 889 (W.D.N.Y.). Joinder permitted: *Englehardt* v. *United States*, 69 F. Supp. 451 (D. Md.); *Bulloch* v. *United States*, 72 F. Supp. 445 (D.N.J.); *Newsum* v. *Pennsylvania R. Co.*, 79 F. Supp. 225 (S.D.N.Y.).

[6] The importance of the conflict between the court below and the District of Columbia Circuit is not diminished by the suggestion in the opinion below (R. 68) "that the language of Section 1346(b) of revised Title 28, United States Code, may be somewhat narrower in effect than the pertinent portion of Section 410(a) of the FTCA * * *." As the notes of the Revisers show (H.R. Rep. No. 308, 80th Cong. 1st sess., p. A123), the slight changes from Section 410(a) to 28 U.S.C. 1346(b) were intended as nothing more than "changes * * * in phraseology." There is no basis for supposing that, with noth-

2. In the *Capital Transit* case, having held that the maintenance of a third-party action against the United States was not authorized by the Tort Claims Act, the Court of Appeals for the District of Columbia Circuit deemed it unnecessary to decide whether the Act authorized imposition upon the Government of liability for contribution to a joint tortfeasor (Appendix B, *infra*, p. 24. While there is thus no present conflict of decisions on this point,[7] the question is, as the court below observes (R. 73), closely related to that of joinder. For the substantive goal of an attempt to implead the United States as third-party defendant is the recovery from the United States of all or part of the original defendant's liability by way of indemnity or contribution. Like the problem of joinder, then, claims for contribution are normal incidents of the many cases involving joint tortfeasors, and are bound to recur repeatedly in federal tort claims litigation until the issue is authoritatively settled.

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ing more than this laconic reference to "phraseology," Congress intended so substantial an amendment as a withdrawal of consent to joinder which it considered the original Act to have granted. The *Capital Transit* opinion refers to the Title 28 revision merely as "codifying the major sections of the Act" (Appendix B, *infra*, p. 13, fn. 1) and appears to treat the two versions as interchangeable.

The same observations would apply with reference to the second question in the instant cases—the permissibility *vel non* of suits for contribution.

[7] But see *Drummond* v. *United States*, 78 F. Supp. 730, 731 (E.D.Va.); *Niagara Fire Ins. Co.* v. *United States*, 76 F. Supp. 850, 855 (S.D.N.Y.).

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition should be granted.

ARNOLD RAUM,
Acting Solicitor General.

JULY, 1950.

APPENDIX

1. The Federal Tort Claims Act (60 Stat. 842), as originally enacted (see footnote 1, *supra*) provided, in pertinent part, as follows:

> SEC. 410. (a) Subject to the provisions of this title, the United States district court for the district wherein the plaintiff is resident or wherein the act or omission complained of occurred, including the United States district courts for the Territories and possessions of the United States, sitting without a jury, shall have exclusive jurisdiction to hear, determine, and render judgment on any claim against the United States, for money only, accruing on and after January 1, 1945, on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death in accordance with the law of the place where the act or omission occurred. Subject to the provisions of this title, the United States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances, except that the United States shall not be liable for interest prior to judgment, or for punitive damages. Costs shall be allowed in all courts to the successful claimant to the same extent

as if the United States were a private litigant, except that such costs shall not include attorneys' fees.

(b) The judgment in such an action shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the Government whose act or omission gave rise to the claim.
* * *

SEC. 411. In actions under this part, the forms of process, writs, pleadings, and motions, and the practice and procedure, shall be in accordance with the rules promulgated by the Supreme Court pursuant to the Act of June 19, 1934 (48 Stat. 1064); and the same provisions for counterclaim and set-off, for interest upon judgments, and for payment of judgments, shall be applicable as in cases brought in the United States district courts under the Act of March 3, 1887 (24 Stat. 505).[8]

'SEC. 412. (a) Final judgments in the district courts in cases under this part shall be subject to review by appeal—

* * * * *

(2) in the Court of Claims of the United States * * *

* * * * *

[8] In the codification of Title 28, the provision for applicability of the Federal Rules of Civil Procedure was omitted as surplusage, "since other provisions of the title provide that tort claims shall be asserted in civil actions, and that the Rules of Civil Procedure promulgated by the Supreme Court shall apply to all civil actions." S. Rep. No. 1559, 80th Cong., 2d sess. (Amendment No. 61).

> SEC. 420. Every claim against the United States cognizable under this title shall be forever barred, unless within one year after such claim accrued or within one year after the date of enactment of this Act, whichever is later, it is presented in writing to the Federal agency out of whose activities it arises, if such claim is for a sum not exceeding $1,000; or unless within one year after such claim accrued or within one year after the date of enactment of this Act, whichever is later, an action is begun pursuant to part 3 of this title.[9] * * *

2. Rule 14(a) of the Federal Rules of Civil Procedure provides as follows:

> Before the service of his answer a defendant may move ex parte or, after service of his answer, on notice to the plaintiff, for leave as a third-party plaintiff to serve a summons and complaint upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. If the motion is granted and the summons and complaint are served, the person so served, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in Rule 12 and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the

[9] Under 28 U.S.C. 2401(b), as amended by Section 1 of Pub. L. No. 55, 81st Cong., 1st sess., April 25, 1949, the limitation period is now two years.

plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule 12 and his counterclaims and cross claims as provided in Rule 13. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant.

APPENDIX B

Opinion of The United States Court of Appeals for the District of Columbia Circuit in Capital Transit Co. v. United States, No. 10467, Decided June 5, 1950

Washington, *Circuit Judge:* This case presents the question whether under the Federal Tort Claims Act [1] the United States may be joined as a third party defendant in a suit between private litigants, when the purpose of such joinder is to

[1] Act of August 2, 1946, c. 753, Title IV, 60 Stat. 842, as amended. See 28 U.S.C. (1950 ed.) §§ 1346(b), 2671-2680 (codifying the major sections of the Act).

secure contribution from the United States as a joint tort feasor.

The plaintiff, Kenneth Neil Stradley, filed suit for damages for personal injuries against the Capital Transit Company, appellant here, alleging negligence. Capital sought and obtained leave of court to make the United States a third party defendant, alleging that the negligence of a Government employee was the sole or the contributing cause of any injury which plaintiff sustained, and requesting that the United States be held liable for a contributable portion of any sum which might be adjudged against Capital in plaintiff's favor. Upon motion by the United States to dismiss the third party complaint for failure to state a cause of action upon which relief could be granted, the District Court entered a final judgment dismissing that complaint with prejudice.

The Federal Tort Claims Act provides, in part, as follows:

> "Subject to the provisions of this title, the United States district court for the district wherein the plaintiff is resident or wherein the act or omission complained of occurred, including the United States district courts for the Territories and possessions of the United States, sitting without a jury, shall have exclusive jurisdiction to hear, determine, and render judgment on any claim against the United States, for money only, accruing on and after January 1, 1945, on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee

> of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death in accordance with the law of the place where the act or omission occurred. Subject to the provisions of this title, the United States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances, except that the United States shall not be liable for interest prior to judgment, or for punitive damages. Costs shall be allowed in all courts to the successful claimant to the same extent as if the United States were a private litigant, except that such costs shall not include attorneys' fees." (Section 410(a), act of August 2, 1946, c. 753, Title IV, 60 Stat. 842).

The District Court in dismissing the third party complaint held that a suit for contribution was not one for "money damages for * * * personal injury or death," within the meaning of the Federal Tort Claims Act. Capital contends that this judgment was erroneous in that it too narrowly construed the waiver of sovereign immunity contained in the Federal Tort Claims Act; that the Act specifically provides that the United States shall be liable to the same extent and in the same manner as a private person; that the clear intendment was that local law should determine whether there is a right of contribution by the joint tort feasors; and that under the law of the District of Columbia, if the United States were a private per-

son, it would be liable for contribution under the circumstances here presented. Appellant further argues that under the Act the United States has made itself amenable to the third party practice provided for in the Federal Rules of Civil Procedure and, accordingly, that the United States properly may be impleaded. The United States contends, first, that even if a suit for contribution is permissible under the Tort Claims Act, still the United States may not be joined as a third party defendant in a suit between private litigants; and, second, that in any event a suit for contribution is not within the scope of the Federal Tort Claims Act, not being a suit sounding in tort.

We have recently held, in *Sappington* v. *Barrett*, U. S. App. D.C. (decided April 14, 1950), that the United States cannot be joined as a co-defendant, to enforce liability as a joint tort feasor, in a suit between private litigants. In the instant case, we have the parallel question whether the United States can be joined as a third party defendant in such a suit. The United States Court of Appeals for the Third Circuit recently considered both questions—joinder of the United States as a joint tort feasor and its joinder as a third party defendant. It concluded that both types of joinder were permissible. *Howey* v. *Yellow Cab Co.* v. *United States*; *Gutmann* v. *Yellow Cab Co.* v. *United States*,[2] — F. 2d — (decided April 27, 1950).

We are constrained to disagree with the learned judges of the Third Circuit. The Act itself does

[2] The actual question in both cases related to joinder of the United States as a third party defendant.

not deal directly with the question of joinder. The legislative history, however, deals with that question very clearly and positively. And the character and framework of the Act, as well as its legislative history, impel us to the conclusion that the United States has not consented to be joined either as a co-defendant or as a third party defendant in a suit between private litigants.

The Tort Claims Act was passed as one chapter of the Legislative Reorganization Act of 1946. Its purpose was twofold. First, it was to provide convenient administrative and judicial remedies to those injured through the fault of a Government employee. Previously, relief ordinarily could only be secured by obtaining passage of special bills by Congress. The second purpose of the Act was to relieve congressional committees of the overburdening work of considering these special bills, involving as it did the task of determining whether the United States should pay to private persons damages for injuries they had allegedly sustained because of the negligence of employees of the Government. Sen. Rep. No. 1400, 79th Cong., 2d Sess., pp. 29-31. Thus, as a matter of function, in cases under the Tort Claims Act the District Courts are sitting in substitution for congressional committees, i.e., on a basis similar to the Court of Claims. *Drummond* v. *United States*, 78 F. Supp. 730-31. This is suggestive of the type of jurisdiction Congress intended to confer. And the report on House Bill 181, 79th Congress, 1st Session, makes explicit the congressional intent that no person should be permitted "to be joined as a defendant with the United States." House Bill 181 was substantially

identical with the Tort Claims Act as finally passed.[3] The House Committee reporting on that bill said:

> "It is intended that the district courts in exercising jurisdiction under this title shall exercise essentially the same type of jurisdiction as district courts exercise concurrently with the Court of Claims of the United States under the Tucker Act (act of March 3, 1887, 24 Stat. 505; 28 U.S.C. sec. 41(2). *The bill therefore does not permit any person to be joined as a defendant with the United States* and does not lift the immunity of the United States from tort actions except as jurisdiction is specifically conferred upon the district

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[3] See Sen. Rep. No. 1400, 79th Cong., 2d Sess., p. 30; *Brooks* v. *United States*, 337 U. S. 49, 52. The Tort Claims Act has a long legislative history, having been submitted to Congress in many forms and for many years prior to its enactment. See *Brooks* v. *United States*, *supra*, at 51. The report accompanying the Tort Claims Act as finally enacted (Sen. Rep. 1400) was a report on the entire Legislative Reorganization Act, of which the Tort Claims Act was but one of seven titles. Accordingly, Sen. Rep. 1400 contained a relatively brief description of the Act. And, unlike H.R. Rep. 1287, *infra*, which accompanied House Bill 181, Sen. Rep. 1400 makes no specific reference to the problem of joinder. The Court of Appeals for the Third Circuit observed that "the legislative history of the FTCA is inconclusive * * *" It expressed the view, however, that the omission of any reference to joinder in Sen. Rep. 1400 indicated "that it was not the intention of Congress to cause the United States to be treated in a different manner from any private litigant in respect to joinder." *Howey* v. *Yellow Cab Co.*, *supra*. But as we have noted, Sen. Rep. 1400 was not a detailed report; it merely outlined the major features of the Act. And, as has been pointed out, it was recognized in the report that with but one exception of substance, the Act is the same as House Bill 181, discussed in H.R. Rep. 1287, *infra*. We therefore consider it proper to give weight to H.R. Rep. 1287. See *Uarte* v. *United States*, 7 F.R.D. 705, 708-09.

courts by this bill. (See *United States* v. *Sherwood*, 312 U.S. 584 (1941); *Lynn* v. *United States*, 110 F. (2d) 586, 588 (C.C.A. 5th, 1940); *Waite* v. *United States*, 57 C. Cls. 546 (1922); *Jackson* v. *United States*, 27 C. Cls. 74, 84 (1891).) The phrase 'as a court of claims' in section 301 of the Senate bill was deleted as surplusage." (H.R. Rep. 1287, 79th Cong. 1st Sess., p. 5) (Emphasis supplied)

Among the cited authorities in that report was *United States* v. *Sherwood*, 312 U.S. 584. There the question was whether or not a private party could be joined with the United States in a suit under the Tucker Act. The Court of Appeals had held in the affirmative relying among other things on the joinder provisions of the Federal Rules of Civil Procedure. 112 F. 2d 587. The Supreme Court reversed, holding that the United States had not consented to be sued under the Tucker Act along with a private party, and that therefore the District Court lacked jurisdiction of the suit against the United States. It further held that even if the Federal Rules were applicable they merely set out the manner in which jurisdiction was to be exercised and could not confer jurisdiction upon the Federal courts. While the *Sherwood* case is not in the strict sense, controlling, we think its reasoning applicable here.[4] It is true that,

[4] Sec. 411 of the Tort Claims Act provided that practice and procedure shall be in accordance with the Rules of Civil Procedure. When Title 28 was revised and codified, this section was omitted as surplusage, "since other provisions of the title provide that tort claims shall be asserted in civil actions, and that the Rules of Civil Procedure promulgated by the Supreme Court shall apply to all civil actions." Sen. Rep. No. 1559, 80th Cong., 2d Sess. (Amendment No. 61.) This deletion makes

unlike the Tort Claims Act, the Tucker Act specifically provided that the District Courts were to have jurisdiction concurrent with the Court of Claims, and that this influenced the Supreme Court's determination that joinder was not permissible. But Congress could not have provided in the Tort Claims Act that the District Courts shall have jurisdiction *concurrent* with the Court of Claims, as it did under the Tucker Act, for the reason that the Court of Claims does not exercise original jurisdiction in tort cases. And, as H.R. Rep. 1287 states, the type of jurisdiction to be exercised was referred to, in bills forming part of the history of the Tort Claims Act, as that of a court of claims. While that reference was deleted in the final draft as surplusage, we think the purpose and framework of the statute demonstrate that the District Courts, under the Act as under its predecessor bills, are sitting substantially as courts of claims.

The Act provides that upon the consent of all appellees an appeal may be taken to the Court of Claims from the District Courts. 28 U.S.C. § 1504. The Supreme Court has said: "The Court of Claims is a legislative, not a constitutional, court. Its judicial power is derived not from the Judiciary Article of the Constitution, but from the Congressional power 'to pay the debts * * * of the United States' * * *." *United States* v. *Sherwood, supra,* at 587. It seems unlikely that Con-

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clear that Congress, in the Tort Claims Act, did not intend, by reference to the Rules of Civil Procedure, to grant a greater measure of jurisdiction than had been indicated elsewhere in the Act, but merely to make the Rules applicable where jurisdiction existed.

gress intended the Court of Claims to determine judicial controversies between private litigants, something completely outside its normal function. Yet that result might follow from joinder of the United States with other defendants. "To magnify the anomaly, suppose the United States did not appeal, or was successful in the lower court while the other defendants were not, and thus put before the Court of Claims only private litigants." *Drummond v. United States*, 78 F. Supp. 730, 732. These factors are not conclusive. But they gain meaning when we note that as against the United States no jury trial may be had under the Act (28 U.S.C. § 2402 (1950 ed.)), while in suits between private litigants there is ordinarily a jury trial as a matter of right. Therefore, if joinder were permitted, the Court of Claims might have to review jury verdicts, clearly beyond the scope of its usual province, as well as non-jury determinations.

Apart from review by the Court of Claims, the question of jury trials presents a real problem if joinder is permissible. Particularly is this true of joinder of the United States as a third party defendant. In the present suit, for example, the United States would be permitted under the Rules of Civil Procedure (Rule 14a) to assert, in addition to its own defenses against a third party plaintiff, any defenses against the plaintiff's claim which the third party plaintiff may have. This opens up the possibility of the court and jury reaching opposite conclusions on the same questions. For the jury might find the defendant (third party plaintiff) liable to the plaintiff, finding against the third party plaintiff on all defenses asserted, while the court, at the same

time, absolved the United States (third party defendant) of liability, finding, on the identical defenses, that the third party plaintiff was not liable to the plaintiff and, accordingly, that there was no right of contribution. Paradoxical possibilities of this sort are certainly indicative that Congress did not intend to permit such joinder.

Appellants contend that because the Act provides that the liability of the United States is to be the same in manner and extent as that of a private individual (28 U.S.C. § 2674) it must follow that the United States can be joined as third party defendant in litigation where a private person would be amenable to such joinder. This contention has much force, *in vacuo*. But when the provision is read within the framework of a comprehensive scheme permitting suit against the Government, and with due consideration of legislative history, it becomes clear that the reference is only to "the jurisdiction of the claim and the liability of the claim," and not to "other incidents of litigation," such as the susceptibility of the United States to be joined in a suit between private parties. *Drummond* v. *United States, supra,* at 731. This is borne out by the fact that, in the very paragraph spelling out the liability of the United States, Congress provided that trial against the United States should be by the court without a jury, whereas, as we have noted, between private litigants jury trial is of right. Section 410 of the Act, now 28 U.S.C. § 2402. The Act also provides a different rule as to venue than is the case in suits between private litigants. Compare 28 U.S.C. § 1402 (b) with § 1391. And a special statute of limitations. 28 U.S.C. § 2401. The reference to liability merely means that the same

substantive law should govern the question whether an employee of the United States had committed a tortious act for which the United States was responsible, and that the same measure of damages should be applicable, as if the United States were a private party. Sen. Rep. No. 1400, 79th Cong., 2d Sess., p. 32.

Thus, whether we approach the problem as one of merely interpreting the face of the statutory language, or whether we go behind that language to the history of the Act, we must reach the same conclusion, namely, that Congress did not intend the United States to be joined as a third party defendant. In our view, therefore, the Tort Claims Act does not permit the joinder of the United States, either as a co-defendant (*Sappington* v. *Barrett, supra*), or as a third party defendant, in a suit between private litigants.

Joinder of parties is ordinarily no more than a question of procedure, and Rule 21 of the Federal Rules of Procedure provides that misjoinder of parties is not grounds for dismissal of an action. But in suits against the United States, such as the present, a different principle prevails. For the United States may only be sued in the manner and according to the procedure to which it has consented. The statute waiving sovereign immunity creates the bounds of the jurisdiction of the Federal courts in entertaining suit against the United States. *United States* v. *Sherwood, supra.*

The Supreme Court has recently held that an insurance company can sue under the Tort Claims Act in its own name, on a claim to which it had become subrogated by reason of payments to the

insured. *United States* v. *Aetna Casualty & Surety Co.*, — U.S. —, 18 U.S.L. WEEK 4060, 4064, decided December 12, 1949. In that case, Chief Justice Vinson, speaking for the court, said:

> "We think that the congressional attitude in passing the Tort Claims Act is more accurately reflected by Judge Cardozo's statement in *Anderson* v. *Hayes Construction Co.*, 243 N.Y. 140, 147: 'The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced.' "

The holding of the Supreme Court in the *Aetna* case represented a broad construction of the Act. But it was one which was amply supported by the purpose, structure and legislative history of the statute. In the present case, even applying the generous view laid down for us in the *Aetna* decision, we find that purpose, structure and history lead us to but one result—a result unfavorable to joinder.

Since we hold that the District Court had no jurisdiction to entertain the third party complaint, we need not here decide whether, in a separate action, appellant here may enforce whatever right to contribution it may have against the United States. Accordingly, without prejudice to the maintenance of such a suit, the judgment of the District Court dismissing the third party complaint is

Affirmed.

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No. 218

In the Supreme Court of the United States

OCTOBER TERM, 1950

UNITED STATES OF AMERICA, PETITIONER

v.

YELLOW CAB COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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No. 218

UNITED STATES OF AMERICA, PETITIONER

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YELLOW CAB COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinions of the United States District Court for the Eastern District of Pennsylvania on the pleadings and proof (R. 12–13) and on the motion of the United States to set aside the verdict (R. 14–16) are not reported. The opinion of the United States Court of Appeals for the Third Circuit (R. 35–45) is reported at 181 F. 2d 967.

JURISDICTION

The judgments of the Court of Appeals were entered on April 27, 1950 (R. 45, 46). The petition for a writ of certiorari was filed on July 24, 1950, and was granted on October 9, 1950 (R. 51). The

jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the Tort Claims Act authorizes impleading the United States as a third-party defendant.

2. Whether the Tort Claims Act subjects the United States to liability for contribution to a joint tort-feasor.

STATUTE AND RULE INVOLVED

Pertinent portions of the Federal Tort Claims Act, in its original form (60 Stat. 842, 28 U. S. C., 1946 ed., 931 *et seq.*),[1] and Rule 14 (a) of the Federal Rules of Civil Procedure are set forth in the Appendix, *infra,* pp. 56–60.

STATEMENT

These two actions arose out of a collision on December 1, 1946, at a street intersection in Phila-

[1] Under the revision of the Judicial Code (Act of June 25, 1948, 62 Stat. 869), the provisions of the Tort Claims Act now appear in Sections 1291, 1346 (b), 1402, 1504, 2110, 2401, 2402, 2411, 2412, and 2671–2680 of Title 28, United States Code. Since the accident involved in this litigation occurred before the effective date (September 1, 1948, see Section 38 of the Act of June 25, 1948, 62 Stat. 992) of the new Judicial Code, we assume with the court below (R. 38) that the original formulation of the Tort Claims Act is applicable here. As indicated below, however (see note 10, *infra*, pp. 30–31), we believe that the slight differences in language between the original Act and the sections of Title 28 which reenact it are immaterial to the questions presented herein.

delphia, Pennsylvania, between a taxicab, owned by respondent and driven by its employee, and a United States mail truck driven by a government employee (R. 3–4, 5, 8–9, 10, 18, 20, 24, 25). The original plaintiffs were passengers in the taxicab at the time of the collision. Predicating federal jurisdiction upon diversity of citizenship and amounts in controversy exceeding $3,000, they brought suit against respondent in the United States District Court for the Eastern District of Pennsylvania, alleging that they had been injured as a result of the negligence of respondent's driver (R. 3, 18). Respondent sought and obtained leave to implead the United States as a third-party defendant in both actions, claiming that the United States was or might be liable to it for all or part of the plaintiffs' claim (R. 4, 5, 19, 20).

Following denial of motions by the Government to dismiss the third-party complaints on the ground that they asserted derivative claims unauthorized by the Tort Claims Act, the cases were consolidated and tried to the court without a jury (R. 9, 24, 25, 12, 14). The court concluded that both the taxicab driver and the mail truck driver had been negligent, awarded judgments totalling $7,800 in favor of the plaintiffs against respondent, and entered judgments for one-half of this amount, $3,900, in favor of respondent against the United States (R. 12–13, 25–26). The Government, contending that the court lacked jurisdiction over the

United States as third-party defendant and that the third-party complaints failed to state claims upon which relief could be granted, moved to have the judgments set aside (R. 13–14). This motion was denied, the court holding that the Tort Claims Act authorized both joinder of the United States as a third-party defendant and the assertion against the United States by a joint tortfeasor of the substantive right to contribution recognized by state law (R. 14–16).

On appeal, the judgments of the district court were affirmed (R. 45, 46). The court below held, first, that while there is "room for doubt," the Tort Claims Act "must be construed to have authorized suits against the United States not only when the United States was the sole or single defendant but also when the United States was joined with another defendant or defendants" (R. 43). Second, the court concluded that the waiver of immunity in Section 410 (a) of the Tort Claims Act to suits "on account of personal injury" was broad enough to include consent to suits for contribution (R. 43–45).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that the United States may be impleaded as a third-party defendant under the Tort Claims Act.

2. In holding that the United States is subject to liability for contribution under that Act.

3. In affirming the judgments of the District Court.

SUMMARY OF ARGUMENT

In permitting the joinder of the United States as a third-party defendant and in holding the United States liable for contribution to a joint tortfeasor, the court below has found a congressional authorization which is nowhere expressed in the Tort Claims Act and which is in fact inconsistent with its terms and history. We submit, therefore, that the court erred in its decision on both of the questions presented here and that either or both of these errors requires reversal of the judgments below.

I

The legislative history of the Tort Claims Act shows clearly the intention of Congress to withhold the consent necessary before the United States may be joined with a private defendant. Congress created in the Act a jurisdiction essentially the same as that exercised by the district courts under the Tucker Act—a jurisdiction which, this Court has held, does not permit joinder of the United States with a private defendant.

Not only does the Tort Claims Act contain no express consent to the joinder of the United States with private defendants, but its scheme is at several points inconsistent with the allowance of such joinder. Thus, like the Tucker Act, the present

Act provides for trials without a jury, a provision appropriate to litigation in which the United States was intended to be a sole defendant. The attempt to combine jury trials between private litigants with non-jury trials against the United States would create problems for the resolution of which the Act offers no guidance because they are problems which were unforeseen and unintended by Congress. The provision for permissive review by the Court of Claims of judgments under the Act—for review, that is, by a tribunal which is peculiarly and exclusively concerned with the assertion of claims against the United States—is further evidence that the Government was meant to be a sole defendant. Finally, the Act's venue provision, simply worded and easily administered where the United States is a sole and original defendant, becomes a source of difficulty under the view that the United States may be joined as a third-party defendant.

Because the third-party suits against the United States exceeded its jurisdiction, the district court should have dismissed the third-party complaints. Severance of the third-party suits—apart from the fact that respondent's claims for contribution did not accrue until its liability to the injured plaintiffs was established—could not cure the court's lack of power to order the joinder of the United States.

II

If our conclusion on the question of joinder is correct, not only is it sufficient in itself to require reversal of the judgments below, but it also weighs heavily against the contention that the United States is subjected by the Tort Claims Act to liability for contribution. For a statute permitting suits for contribution, but forbidding joinder, would impose a pointlessly technical requirement that closely related or identical issues be litigated separately.

Apart from the question of joinder, however, congressional consent to the assertion against the United States of a substantative right of contribution is not conferred by the Tort Claims Act. As its title announces and as its legislative history repeatedly demonstrates, the Act was designed to permit suits on tort claims and its provisions deal only with the problems presented by such claims. A suit for contribution does not assert a tort claim. The right to contribution, where it exists at all, is independent and quasi-contractual in nature, a right created by decision or statute as a mode of distributing loss among tortfeasors. Because it is different and separate from the right of the tort claimant, the right to contribution may be asserted in cases where a tort claim would be barred by a statute of limitations, a release, or a prior judgment. The Tort Claims Act neither

contemplates nor permits these results, which are inconsistent with a number of its provisions.

Nor is the inconsistency cured by anything in the legislative history of the Act. Though a single House Report, published more than four years prior to passage of the actual statute, contained a passage which might superficially be construed to suggest that contribution was to be authorized by the bill then under consideration, such a construction becomes untenable upon closer examination. In any event, this single remark in a long legislative history, made in an earlier Congress and concerned with a bill which never became law, cannot alter the result required by the later and different bill which became the Tort Claims Act.

Equally irrelevant to the present problem is the fact that subrogees may sue under the Tort Claims Act. A subrogee asserts no independent right like the right of contribution, but stands in the shoes of the tort claimant, suing upon the very tort claim which the latter might have brought, subject to the same defenses and limitations.

Finally, the fact that contribution may be obtained from the Government under the Suits in Admiralty and Public Vessels Act is of no aid to respondent here. These statutes waive the Government's immunity to any type of admiralty claim—a waiver obviously broad enough to permit claims for contribution. The Tort Claims Act, on

the other hand, does not authorize civil claims generally, but only tort claims.

ARGUMENT

In posing the issues before this Court, it may be helpful to state briefly the two basic considerations which mark both the starting-points and the limits of the present controversy. First, it is agreed that on comparable facts a private person might have been joined by respondent as a third-party defendant (Fed. R. Civ. P. 14 (a), *infra*, p. 60) and might have been held liable for contribution under Pennsylvania Law (12 Pa. Stat. (Purdon) § 2081). Second, however, it is settled that, absent the consent of Congress, the sovereign immunity of the United States makes unavailable against the Government both the "procedural" weapon of joinder and the substantive right of contribution. The only questions, therefore, are whether Congress has authorized either joinder or contribution. To prevail, respondent must show that both have been authorized.

For the requisite congressional consent respondent has invoked the Federal Tort Claims Act. But that Act contains no express authorization for either joinder or contribution and, far from implying such authorization, its terms, its structure, and its history point decisively the other way. We shall urge, therefore, that the court below has erred in its rulings on each of the two questions presented herein and that either

of these errors constitutes an independent ground requiring reversal of the judgment below.

I

THE UNITED STATES MAY NOT BE JOINED WITH ANOTHER DEFENDANT IN A SUIT UNDER THE TORT CLAIMS ACT

A. *Congress intended to withhold the consent required for joinder of the United States with another defendant*

The decision in *United States* v. *Sherwood,* 312 U. S. 584, settled the rule, which had theretofore been announced in lower federal courts (see *infra,* p. 12), that the consent conferred by the Tucker Act to suits against the United States does not authorize suits in which the United States is joined with another defendant. Under that decision, it is clear, such an ordinarily "procedural" question as joinder becomes, in suits against the United States, a matter "of jurisdiction whose limits are marked by the Government's consent to be sued." 312 U. S. at 591. Congressional authorization of suits against the United States on a designated class of claims is of itself insufficient to embroil the United States "in litigations in which issues between the plaintiff and third persons are to be adjudicated." *Id.* at 589, 591–592.

In its reports on the bills which ultimately became the Federal Tort Claims Act, Congress

demonstrated in unmistakable terms both its familiarity with the *Sherwood* case and its intention that the rule of that case was to apply under the Act—that joinder of the United States with other defendants in tort claims suits was not to be permitted.[2] The Report of the House Judiciary Committee on H. R. 181, 79th Cong., 1st Sess., the bill which, essentially unchanged, became the Tort Claims Act (see S. Rep. No. 1400, 79th Cong., 2d Sess., p. 30; *Brooks* v. *United States*, 337 U. S. 49, 52), declared (H. Rep. No. 1287, 79th Cong., 1st Sess., p. 5):

> It is intended that the district courts in exercising jurisdiction under this title shall

[2] Strictly speaking, the word "joinder" describes the situation where a plaintiff sues two or more defendants together, while "impleader" is the technically correct description of the procedural device whereby a third-party suit is commenced. For present purposes, however, the practical effects of the two procedures are substantially identical, and we use the term "joinder" to describe both—following the usage of the court below and of the Court of Appeals for the District of Columbia Circuit in *Capital Transit Co.* v. *United States*, No. 204. If the United States and a private defendant are joined by the plaintiff, they may assert cross-claims against each other. Fed. R. Civ. P. 13(g). If the joinder results from a third-party complaint, the original plaintiff and third-party defendant may assert claims against each other. Fed. R. Civ. P. 14 (a), *infra*, p. 60. Thus, however the joinder is initially accomplished, it tends ultimately to litigation in the same suit of (1) claims between original plaintiff and private defendant, (2) claims between original plaintiff and United States, and (3) claims between private defendant and United States.

> exercise essentially the same type of jurisdiction as district courts exercise concurrently with the Court of Claims of the United States under the Tucker Act (act of March 3, 1887, 24 Stat. 505; 28 U. S. C. sec. 41 (20)). *The bill therefore does not permit any person to be joined as a defendant with the United States* and does not lift the immunity of the United States from tort actions except as jurisdiction is specifically conferred upon the district courts by this bill. (See *United States* v. *Sherwood,* 312 U. S. 584 (1941); *Lynn* v. *United States,* 110 F. (2d) 586, 588 (C. C. A. 5th, 1940); *Waite* v. *United States,* 57 C. Cls. 546 (1922); *Jackson* v. *United States,* 27 C. Cls. 74, 84 (1891). *The phrase "as a court of claims" in section 301 of the Senate bill was deleted as surplusage.* [Italics added.]

The foregoing language was familiar to the Senate Committee dealing with the Tort Claims bill in its final form, as evidenced by that Committee's reference to, and extensive quotation from, the Report in which it appeared. S. Rep. No. 1400, 79th Cong., 2d Sess., p. 30.[3] And the

[3] The intention to forbid joinder was not expressly reiterated in S. Rep. No. 1400, 79th Cong., 2d Sess. This report dealt, however, with S. 2177 which became the omnibus Legislative Reorganization Act of 1946 and of which the Tort Claims Act comprised only one of (then) seven titles (as passed, the Reorganization Act contained six titles). In the circumstances, the failure to detail again the already crystallized view that joinder was to be imper-

identical language had appeared in a report on an earlier bill (H. Rep. No. 2245, 77th Cong., 2d Sess., p. 9), a report which repeated, in a connection to be discussed below (see *infra*, pp. 46–47, 50), the Committee's insistence that "no person may be joined with the United States as defendant" (p. 12).

These expressions of congressional intent are too clearly and precisely applicable to the problem at hand to require extensive elaboration here. Congress knew that, unless it consented to joinder of the United States with other defendants in suits under the Tort Claims Act, such joinder would be forbidden. Knowing this, it declared that the statutory language invoked by respondent withholds the necessary consent. It is against this background that the Act must be examined to determine whether Congress has unwittingly authorized a result which it insistently declared was to be avoided.

B. *The Act contains no express consent to joinder and its scheme is inconsistent with the presence of defendants other than the United States in the actions it authorizes*

The provisions of the Act nowhere express the consent to joinder of the United States with

missible hardly warrants the inference that the view had been tacitly abandoned. On the other hand, the recognition in S. Rep. No. 1400 of the substantial identity between H. R. 181 and the tort claims title of S. 2177 and the reference back to the House Report on H. R. 181 are plainly indicative of an unchanged legislative intent.

another defendant which is shown by the *Sherwood* decision to be required before any such joinder could be permitted. *Drummond* v. *United States*, 78 F. Supp. 730 (E. D. Va.); *Uarte* v. *United States*, 7 F. R. D. 705 (S. D. Cal.). Quite properly, we believe, the court below (R. 41) has rejected the notion that joinder was authorized by the provision in the Act (Section 411, 60 Stat. 844, *infra*, p. 58) making applicable to actions thereunder "the forms of process, writs, pleadings, and motions, and the practice and procedure" prescribed in the Federal Rules of Civil Procedure.[4] For the suggestion that these rules of *procedure* can serve to enlarge the limits of the jurisdiction created by the consent of Congress is squarely refuted by the decision in *United States* v. *Sherwood*, *supra*. See 312 U. S. at 589-590, 591. Indeed, the Rules themselves (see Rule 82) expressly disclaim any purpose to affect jurisdiction.[5]

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[4] This provision was omitted as unnecessary when the sections of the Act were distributed through Title 28 of the U. S. Code. Without this provision, the Federal Rules apply, as they do to actions under the Tucker Act (cf. *United States* v. *Sherwood*, *supra*, at 589) and to all other civil actions. See S. Rep. No. 1559, 80th Cong., 2d Sess., pp. 11-12.

[5] The committee reports we have cited as showing the impermissibility of joinder were addressed to bills which contained provisions similar to that in Section 411 making the Federal Rules applicable. These reports, immediately after stating that joinder was to be prohibited, referred to the provisions making the Federal Rules applicable, thus unmistakably indicating that those were not regarded as authorizing joinder. See H. Rep. No. 2245, 77th Cong., 2d Sess., p. 9; H. Rep. No. 1287, 79th Cong., 1st Sess., p. 5.

Nor is respondent's position supported by the provision in Section 410 (a) (60 Stat. 843, now 28 U. S. C. 2674) that, with respect to claims for which it assumed liability under the Act, the United States consented to be "liable * * * in the same manner and to the same extent as a private individual under like circumstances * * *." On its face this provision deals with the *liability* the Government assumes, and not the nature of the litigation to which the Government consents. Moreover, the language in question, however it might be construed if it had no context, cannot fairly or intelligibly be read alone. It bears repetition, first of all, that this very language was contained in the bills to which the committee reports referred when they declared flatly that joinder was to be impermissible. Even more significantly, the directive that the United States was to be "liable * * * in the same manner and to the same extent as a private individual" is to be read, as the sentence in which it appears dictates, "[s]ubject to the provisions" of the Act as a whole. And when the language is so read, it clearly cannot be viewed as authorizing joinder of the United States with other defendants. For the Act as a whole created a jurisdiction like that described in the committee reports—of "essentially the same type * * * as district courts exercise concurrently with the Court of Claims * * * under the Tucker

Act"—a jurisdiction neither contemplating nor consistent with the joinder of the United States with other defendants.

1. Congress provided that suits under the Act were to be tried by the court "sitting without a jury." Section 410 (a), 60 Stat. 843, now 28 U. S. C. 2402. Private parties, on the other hand, have the commonly exercised right to a jury trial.[6] Apart from the difficulties, presently to be discussed, of combining jury trials between private litigants with non-jury trials against the United States, the provision for trial without a jury evidences a congressional understanding that, as under the Tucker Act, the United States was to be a sole defendant in suits under the Tort Claims Act.[7] Moreover, the very failure of Congress to make provision for the mingling of jury with non-jury trials or to express anywhere in the Act's long history an awareness that such a situation might arise supports the conclusion that Congress carried out its express intention to preclude joinder.

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[6] In the present suits, there appears to have been no demand for a jury trial, and the original actions and third-party actions were tried together without a jury (R. 14). In *Capital Transit Co.* v. *United States*, No. 204 (of which see R. 3), the injured plaintiff demanded a jury trial of his suit against Capital Transit.

[7] "The trial will be without a jury as is now the case in suits under the Tucker Act," S. Rep. No. 1400, 79th Cong. 2nd Sess., p. 32.

And this conclusion is reinforced when we consider some of the difficulties of reconciling the ban against jury trials in the Tort Claims Act with the holding below that the United States may be impleaded as a third-party defendant. In defending the claim against itself the United States as a third-party defendant is entitled to interpose defenses to the plaintiff's claim against the third-party plaintiff. Fed. R. Civ. P. 14 (a), *infra*, p. 60. The Act requires that any issues raised by these defenses be tried to the court without a jury. But the plaintiff, who need not and frequently will not assert any claim against the third-party defendant,[8] has the right to have his claim against the third-party plaintiff (the original defendant) tried by a jury. The Act affords no clue to a resolution of the resulting impasse. The suggestion of the court below (R. 39) that the jury problem is solved by having judge and jury make separate findings is clearly inadequate since it would invite the incongruous possibility of divergent determinations on identical issues of fact and liability.

Because the third-party plaintiff's liability to the plaintiff is an essential element of the claim for contribution, such divergent findings by judge and jury would result in obvious embarrassment.

[8] Neither in this case nor in *Capital Transit Co.* v. *United States*, No. 204, did the original plaintiffs amend their complaints so as to assert claims upon the United States as tortfeasor.

Thus, the jury may award a verdict against the third-party plaintiff, concluding from the evidence that the plaintiff was free of contributory negligence. The court, although deeming the evidence sufficient to support the verdict, may nevertheless, on its own view of the evidence, conclude that the plaintiff was contributorily negligent. Ordinarily, the party from whom contribution is claimed is bound by the adjudication of the claimant's liability to the injured person. *Knell* v. *Feltman*, 174 F. 2d 662, 665 (C. A. D. C.); *cf.* Gregory, *Procedural Aspects of Securing Tort Contribution in the Injured Plaintiff's Action*, 47 Harv. L. Rev. 209, 214 (1933). If this rule is applied, however, it results in a judgment against the United States predicated in part on a jury verdict, contrary to the Act's command. If, on the other hand, the court's finding controls as to the liability of the United States, the anomalous result is reached of denying recovery to the third-party plaintiff on the ground that he was not liable, despite the fact that he has been held liable, to the original plaintiff. Neither solution seems satisfactory; neither, we think, was ever intended to be necessary.

Potential difficulties could be multiplied—for example, the possibility of divergent findings on the question of damages or the differing consequences on appeal of improperly admitted evidence depending on whether the facts are tried

by judge or jury. See *McCaskill Co.* v. *United States,* 216 U. S. 504, 516–517; *Thompson* v. *Carley,* 140 F. 2d 656, 660 (C. A. 8). The complete omission, in the long history of the Act before Congress, of any mention of these difficulties, much less any attempt to guide the courts in their resolution, confirms the conclusion that in providing for trial without a jury, Congress contemplated a jurisdiction, like that under the Tucker Act, limited to cases in which the United States is the sole defendant.

2. Section 412 of the Act, 60 Stat. 844, now 28 U. S. C. 1504, provides for a review of judgments in cases under the Act by the Court of Claims upon consent of all the appellees. The notion of litigation in the Court of Claims between private litigants or of Court of Claims review of jury findings—both possible if joinder is permissible under the Act—led Judge Bryan, in *Drummond* v. *United States,* 78 F. Supp. 730, 732 (E. D. Va.), to make the following observations in the course of an opinion refusing to allow joinder:

> * * * There will be but one final judgment even if joinder is permitted. It may be entered both on a jury's verdict as to the individual defendants and on the court's finding in respect to the United States. The Court of Claims, if its review were sought, would then be passing upon a jury case, a function foreign to its character. Moreover, the Court of Claims would thus

> have before it a claim by one individual against another, which equally demonstrates that the Act never envisaged a defendant other than the United States. To magnify the anomaly, suppose the United States did not appeal, or was successful in the lower court while the other defendants were not, and thus put before the Court of Claims only private litigants.

It is, in short, scarcely conceivable that Congress would have chosen the Court of Claims as an appellate court had it intended that suits under the Act would involve defendants other than the United States. For the Court of Claims is peculiarly and exclusively a forum for the assertion of claims against the United States, a legislative tribunal to which a role was appropriately given in fulfilling "the purpose of Congress to relieve itself [by the Tort Claims Act] of consideration of private claims * * *." *United States* v. *Aetna Surety Co.*, 338 U. S. 366, 380. It seems unlikely that Congress would have conferred upon that Court the additional function of reviewing private litigation without discussion or explanation of so unprecedented a step. Cf. *United States* v. *Jones*, 336 U. S. 641, 651–652. Some comment, at the very least, would undoubtedly have been provoked by the constitutional doubts implicit in the possibility of review by the Court of Claims of jury findings. Cf. Hearings before the Committee on the Judiciary, House of Representatives, 77th Cong., 2d Sess., on H. R. 5373 and H. R. 6463, pp.

21–23; opinion below, R. 40. But the reports and debates are silent on such problems also—a further indication that Congress intended to create only the same type of jurisdiction as that existing under the Tucker Act. Cf. *National Ins. Co.* v. *Tidewater Co.*, 337 U. S. 582, 593–594.

3. Section 410 (a) of the Tort Claims Act, 60 Stat. 843, now 28 U. S. C. 1402 (b), provides that suits thereunder may be brought only in "the district wherein the plaintiff is resident or wherein the act or omission complained of occurred * * *." Here again, joinder of the United States as a third-party defendant may be seen to have been beyond the legislative intent. If, as we think is clearly the case, the Act was intended to provide for suits between tort claimants on the one hand and the United States as sole defendant on the other, the venue provision is simple and obvious in its purpose. It becomes perplexing, however, if joinder is thought to be permissible.

Ordinarily, where a tort action has been commenced between private litigants, it may be brought in the district where the plaintiff resides, where the defendant resides (see 28 U. S. C. 1391 (a)), or—since defects of venue may be waived—in neither. The district in which the action is heard may or may not happen to be the one in which the allegedly tortious acts occurred. Where an attempt is made to bring a third-party

suit within the venue provision of the Tort Claims Act, the question inevitably arises whether Congress intended the applicable district of residence to be that of the original plaintiff or that of the third-party plaintiff. However this question might be answered by the courts, the presently significant point is that it is not answered in the Act. In requiring suit to be brought either where the wrong occurred or in "the district where *the plaintiff* is resident," Congress contemplated only a plaintiff with a tort claim, not a third-party plaintiff who, for wholly fortuitous reasons, might or might not be engaged in defending a suit in the district of his residence.

C. *Because it lacked jurisdiction to implead the United States, the District Court should have dismissed the third party complaints*

For the foregoing reasons we think it clear that the Tort Claims Act does not authorize joinder of the United States with other defendants. It may be suggested, however, that although such joinder in a single action is prohibited, it would have been permissible for the court below to sever the proceedings, and to treat the issues raised by the third-party complaints as independent actions. We believe that any such suggestion would be untenable.

As we have shown (*supra*, p. 10), an incorrect decision allowing joinder of the United States

is not merely a procedural error, but constitutes the assumption of a non-existent jurisdiction. Accordingly, where an original plaintiff sought to join the United States with another defendant, it has been held, in effect, that since the court can acquire no jurisdiction over the United States as a co-defendant, it cannot order a severance but must dismiss the action against the United States for want of jurisdiction. *Sappington* v. *Barrett,* 182 F. 2d 102 (C. A. D. C.). But cf. *Prechtl* v. *United States,* 84 F. Supp. 889 (W. D. N. Y.); *Drummond* v. *United States,* 78 F. Supp. 730 (E. D. Va.); *Uarte* v. *United States,* 7 F. R. D. 705 (S. D. Cal.). *A fortiori* it seems clear that an attempt to implead the United States as a third-party defendant must, if the Tort Claims Act does not authorize this procedure, be blocked at its very inception.

In the first place, where a defendant seeks to join the United States as a third-party defendant despite the fact that the United States has not consented to such joinder, it is the very order allowing the third-party complaint which is beyond the court's jurisdiction. No subsequent order of severance can cure this fatal lack of power at the inception of the third-party action. It may be that the technically correct procedure for attacking an improper attempt to commence a third-party suit is a motion to vacate the order

granting leave to bring in the additional defendant. See 3 Moore, *Federal Practice* (2d ed., 1948) 447–448, and cases there collected, footnote 22. But, regardless of the device employed to raise the point, the court cannot issue an order beyond its jurisdiction to implead the United States and then, never having acquired jurisdiction over the United States, create such jurisdiction by ordering a severance.

Moreover, where, as here, it seeks contribution *in the event* the third-party plaintiff (respondent) is held liable to the original plaintiffs, the third-party complaint states no claim which is capable of being separated and maintained as an independent suit. Federal Rule 14 (a) provides for a third-party action by a defendant against a party "who is or may be liable to him for all or part of the plaintiff's claim against him." Respondent sought to implead the United States, not because the United States *was* liable to it, but only because it might be. Until or unless respondent was held liable to the plaintiffs, it could have no ripened claim for contribution. See *infra*, pp. 34–35. Because Rule 14 (a) contains the words "may be," it permits an "acceleration of liability," but only in the sense that a potential claim may be put in litigation before it would sustain an independent suit. See *Jeub* v. *B/G Foods*, 2 F. R. D. 238, 240 (D. Minn.); 3 Moore, *Federal Practice* (2d ed., 1948) 419–421. It is only because of these

words and within the framework of Rule 14 (a) that such a claim could have been asserted by respondent before its own liability had been determined.

Obviously, however, respondent could not have maintained at the outset of this litigation an independent suit for contribution (assuming, as we have solely for purposes of discussion to this point, that the United States has consented to such suits). Therefore, since Congress has not consented in the Tort Claims Act to the use against the United States of the machinery of Rule 14 (a), the district court should have dismissed the third-party complaint.

II

THE UNITED STATES HAS NOT CONSENTED IN THE FEDERAL TORT CLAIMS ACT TO SUITS FOR CONTRIBUTION BY JOINT OR CONCURRENT TORTFEASORS

If, as we have urged, there is no jurisdiction under the Federal Tort Claims Act for the joinder of the United States by or with another defendant, this conclusion alone weighs heavily against the contention that the Act authorizes suits for contribution. Since a suit for contribution necessarily involves many of the issues and much of the evidence relevant to the injured person's suit against the tortfeasor, the desirability of disposing of both suits in a single proceeding is obvious. Cf. *Jones* v. *Waterman S. S. Corp.*, 155 F. 2d 992, 997 (C. A. 3).; Amer. L. Inst., *Contribution Among*

Tortfeasors Act, Tentative Draft No. 1 (1938) pp. 28–29. Thus, while contribution may (in a number of states at least) be sought in an independent suit between tortfeasors,[9] a statutory scheme permitting contribution but barring joinder would be an incongruous invitation for a multiplication of overlapping suits.

Wholly apart from the question of joinder, however, we submit that the court below has erred in its conclusion that the United States may be sued for contribution as a joint tortfeasor. The consent necessary for such a suit is nowhere expressed in the Tort Claims Act, and to infer it would be inconsistent in important respects with the terms of the Act.

A. *As its history, its title, and its provisions make clear, the Tort Claims Act is a consent only to suit on tort claims*

The Federal Tort Claims Act was enacted in order to waive the Government's immunity to suits on tort claims. Throughout its history, the fact that this legislation related to tort claims

[9] In a few states, contribution is available between tortfeasors only when they have been sued jointly by the plaintiff and a joint judgment has been recovered against them. See 3 Moore, *Federal Practice* (2d Ed., 1948) 483–487; Gottlieb, *Contribution and Indemnity in Tort Actions against the United States*, 9 Fed. B. J. 391, 398 n. 29 (1948). In these states, a construction of the Tort Claims Act as allowing contribution but forbidding joinder would make the authorization of contribution meaningless.

was constantly reiterated. See, *e. g.*, S. Rep. No. 1196, 77th Cong., 2d Sess., pp. 1, 4, 5, 7; H. R. Rep. No. 2245, 77th Cong., 2d Sess., pp. 1, 5, 7, 10; H. Rep. No. 1287, 79th Cong., 1st Sess., pp. 1, 3, 5; S. Rep. No. 1400, 79th Cong., 2d Sess., pp. 29, 31. Predecessor bills were described as being designed "to extend to claimants against the Government *for torts of negligence* the same right to a day in court which claimants now enjoy in fields such as breach of contract, patent infringement, or admiralty claims" (S. Rep. 1196, *supra,* at p. 5.); "to waive a part of the governmental immunity to *suit in tort* and to permit *suits on tort claims*" (H. Rep. 2245, *supra,* p. 5; H. Rep. 1287, *supra,* p. 1); to abolish the "existing exemption [of the Government from suit] in respect to *common law torts*" (H. Rep. No. 2245, *supra,* p. 7). [Italics added in foregoing quotations.]

With this purpose in view, Congress enacted, not a statute consenting to suit on all claims somehow related to the tortious conduct of a government employee, but a "Tort Claims Act," providing in Part 2 for the "Administrative Adjustment of Tort Claims Against the United States" and in Part 3 for "Suits on Tort Claims Against the United States." When the provisions of the Act were distributed through the sections of the new Title 28, United States Code, the recurrent necessity for referring to the claims

comprehended by the Act emphasized sharply the congressional understanding that the "claims" being dealt with were tort claims. Thus, while Section 1346 (b) of Title 28 employs language substantially identical with that of Section 410 (a) of the original Act—that is, authorizes "civil actions on claims * * * for injury or loss of property," etc., without actually using the word "tort"—the remaining sections, in referring back to the claims so authorized, repeatedly employ such terms as "tort claims" or "tort claims cases." §§ 1402 (b), 1504, 2110, 2401 (b), 2672, 2674.

Concerned with "tort claims cases," Congress created the jurisdiction requisite to the adjudication of such cases, but did "not lift the immunity of the United States from tort actions except as jurisdiction [was] specifically conferred upon the district courts * * *." H. Rep. No. 1287, *supra*, p. 5. In its original form, in Section 410 (a) of the Act (60 Stat. 842, 843–844), the jurisdictional grant covered—

> any claim against the United States, for money only * * * on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would

> be liable to the claimant for such damage, loss, injury, or death in accordance with the law of the place where the act or omission occurred. Subject to the provisions of this title, the United States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances * * *.

Changed only in phraseology, the same provisions are now contained in Title 28 of the United States Code, where they read:

> § 1346 (b) [as amended by Sec. 2 (a), Pub. L. No. 55, 81st Cong., 1st sess., April 25, 1949]. Subject to the provisions of chapter 171 of this title, the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, * * * for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.
>
> § 2674. *Liability of United States.*— The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the

> same extent as a private individual under like circumstances * * *.

The court below has concluded (R. 44) that "Broader phrases or words more likely to embrace liability generally are difficult to imagine." But the word "generally" in this statement is, we submit, without basis. Nor is there any support in the terms of the Act or in legal theory for the next sentence in the court's opinion which declares: "A joint tort-feasor would have a claim on account of personal injury as would a subrogee." As we shall show below (*infra*, pp. 51–53), a subrogee suing under the Tort Claims Act is simply a tort claimant standing in the shoes of his injured subrogor. A claim for contribution, on the other hand, is different from and, in vital respects, independent of the tort claim to which it relates (see pp. 37–45, *infra*). In our view, the critical error of the court below in analyzing the text of the Tort Claims Act is its failure to consider that the property damage or personal injury for (or "on account of" [10]) which

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[10] Among other changes which we believe are clearly immaterial (see *United States* v. *Aetna Surety Co.*, 338 U. S. 366, 370 n. 5), the words "on account of" were replaced by "for" when the language of Section 410 (a) was codified in Section 1346 (b) of Title 28. The stress in the opinion below (R. 44) on the phrase "on account of" would seem to be related to the court's suggestion (R. 38) that "it seems * * * possible that the language of Section 1346 (b) of revised Title 28 * * * may be somewhat narrower in effect than the pertinent portion of Section 410 (a) * * *."

the Government assumes liability is damage or injury "caused by" the negligence of a government employee. We shall show that this requirement of causality appropriately comprehends tort claims and excludes claims for contribution, which are neither in law nor in fact based upon losses "caused by" a joint tort-feasor's negligence. See pp. 32–36, *infra*.

Our position is that the language of the Tort Claims Act accomplishes the repeatedly expressed congressional purpose and no more. In order to come within the terms of this waiver of immunity, a claim must be one "on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government"—must be, in short, a tort claim. It is only with respect to such a claim that the Government consents to be liable "in the same manner, and to the same extent as a private in-

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The notes of the Revisers show, however (H. Rep. No. 308, 80th Cong., 1st Sess., p. A123), that the slight changes from Section 410 (a) to 28 U. S. C. 1346 (b), were intended as nothing more than "changes * * * in phraseology." There is no basis for supposing that, with nothing more than this laconic reference to "phraseology," Congress intended so substantial an amendment as a withdrawal of consent to suits for contribution which it considered the original Act to have granted. If anything, the purely verbal substitution of "for" in place of "on account of" simply highlights the conclusion we deem to be clearly required in any case—that the latter phrase was never intended to convey the indefinitely expansible meaning attributed to it by the court below.

dividual under like circumstances." Unless a suit for contribution is a tort claim within the waiver effected by the Tort Claims Act, the equating of the Government with a private individual respecting claims which are covered by the waiver is of no help to appellant here. See *Long* v. *United States*, 78 F. Supp. 35, 38 (S. D. Cal.). The solution to the present problem would appear to follow, therefore, from examination of the nature and incidents of respondent's claim.

B. *Suits for contribution—independent, quasi-contractual in nature, and significantly different from tort claims in their practical consequences—are not comprehended by the Tort Claims Act*

It seems clear even upon brief analysis that the claim of respondent against the United States is not a tort claim. Respondent has suffered no "loss of property or * * * personal injury * * * caused by the negligent or wrongful act or omission of any employee of the Government * * *." Respondent's liability to the injured plaintiffs is in no sense attributable to the tortious conduct of a government employee, but results from the finding that respondent's own employee was negligent.

The Government has breached no duty imposed by tort law in favor of respondent.[11] The negli-

[11] "There are many instances in which the tortious conduct of A towards B is part of a chain of causation resulting ul-

gence of either may have been a sufficient cause of the injury, in which case either would have been liable regardless of the negligence of the other. Even where this is not so, however, the fact that contributory negligence is ordinarily a bar to recovery demonstrates that one negligent tortfeasor acquires no tort claim against another. Any attempt by respondent to formulate its loss (its established liability to the injured plaintiffs) as a tort claim for a loss "caused by" the negligence of the Government's employee would prove fruitless because the negligence of respondent's own employee, already determined and necessarily averred to support a claim for contribution, contributed to that loss.[12]

Where the right of contribution exists among concurrently negligent tortfeasors, it exists as an "independent right" (*Niagara Fire Ins. Co.* v. *United States*, 76 F. Supp. 850, 855 (S. D.

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timately in liability of C to B. It does not follow, however, that A has breached any duty owed to C, or that C has any tort claim against A. For example, where a life insurer has been forced to pay insurance because of the tortious killing of the insured, the insurer acquires no claim against the tortfeasor. *Insurance Co.* v. *Brame*, 95 U. S. 754; cf. *The Federal No. 2*, 21 F. 2d 313 (C. A. 2). This is so because the completion of the insurer's contract obligation is not regarded as a proximate consequence of the tortfeasor's conduct.

[12] Pennsylvania is one of the great majority of states in which contributory negligence is a bar to recovery. *Pessolano* v. *P. T. C.*, 349 Pa. 73; *Zlates* v. *Nasim*, 340 Pa. 157, 159.

N. Y.)), "based upon * * * the idea of equalization of burden" (*Brown Hotel Co. v. Pittsburgh Fuel Co.*, 311 Ky. 396, 401), and is "a mere debt arising from an equitable duty, having none of the elements of a tort." *Feldman* v. *Gomes*, 98 Pa. Super. 84, 87; *Drummond* v. *United States*, 78 F. Supp. 730, 731 (E. D. Va.); *Maio* v. *Fahs*, 339 Pa. 180, 189; *Parker* v. *Rodgers*, 125 Pa. Super. 48, 51–52; *Brown* v. *Haertel*, 210 Wis. 354, 358–359; Woodward, *Quasi Contracts* (1913) § 259 (5). Quasi-contractual in nature, the right of contribution is afforded as a mode of spreading the burden regardless of the fact that the injured plaintiff, who alone has a tort claim, has chosen to enforce it against less than all of those potentially liable to him.[13]

The right arises, therefore, not because the party from whom contribution is sought has breached any duty owed in tort law to the party seeking contribution, but because the contributee has paid off a liability to which both could have been subjected. That liability may, as here, be a liability in tort, or it may be a liability in contract. In either event, it is the payment which creates the right. *Adam* v. *Vacquier*, 48 F. Supp.

[13] The distinction between tort claims and claims for contribution is further illustrated by the fact that the limitation period governing the latter has been held to be, not that applicable to tort claims, but that applicable to contracts implied in law generally, ordinarily about five years. See *Harris* v. *Bader*, 326 Ill. App. 471; 13 Am. Jur. 75.

275 (W. D. Pa.); *In re Trust of Lunt*, 237 Iowa 1097; *Consolidated Coach Corp.* v. *Burge*, 245 Ky. 631, 635; *Walker* v. *Kroger Grocery & Baking Co.*, 214 Wis. 519; see *Phillips-Jones Corp.* v. *Parmley*, 302 U. S. 233, 236; *Restatement, Restitution* § 82 (1). Having paid in full an obligation for which he was liable in full, the contributee is granted the right to place a share of the burden upon the contributor who might also have been required to discharge the obligation.

Rooted in equity, and essentially the same whether the obligation to which it relates sounds in contract or tort (*Brown* v. *Haertel*, 210 Wis. 354, 359), the right of contribution has been widely commended as a mode of distributing loss among joint tortfeasors.[14] It remains, nevertheless, a right as to which Congress has not granted the consent necessary for suit against the United States. It seems safe to say that the law of every state in this country imposes upon private employers liability "on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee * * * while acting

[14] See, *e. g.*, *Bohlen, Contribution and Indemnity between Tortfeasors*, 21 Corn. L. Q. 552 (1936); Gregory, *Contribution among Joint Tortfeasors: A Defense*, 54 Harv. L. Rev. 1170 (1941); Leflar, *Contribution and Indemnity between Tortfeasors*, 81 U. Pa. L. Rev. 130 (1932). But cf. James, *Contribution among Joint Tortfeasors: A Pragmatic Criticism*, 54 Harv. L. Rev. 1156 (1941).

within the scope of his * * * employment * * *." Yet the overwhelming majority of those states, in the absence of statute, deny any right of contribution among joint tortfeasors. See articles cited in note 14, *supra; Restatement, Restitution* § 102. The language we have quoted, while it correctly states an elementary principle of tort law, is not broad enough to encompass the independent, quasi-contractual right of contribution among tortfeasors. And that language is the language of the Tort Claims Act which the court below has construed as including respondent's claim. The construction is, we submit, unwarranted. Cf. 3 Moore, *Federal Practice* (2d ed., 1948) 516. Just as the Government's consent to suit on its contracts is not a consent to suit on contracts implied in law (*United States* v. *Minnesota Investment Co.*, 271 U. S. 212, 217, and cases cited), so, here, its consent to suit on tort claims is not a consent to suit on obligations implied by the law as a means of distributing loss among tortfeasors.

Apart from the obviously different judgments of policy underlying recognition of the two types of claim[18]—judgments peculiarly legislative and

[18] On this point compare the majority and dissenting opinions in *George's Radio* v. *Capital Transit Co.*, 126 F. 2d 219 (C. A. D. C.); also, compare James, *Contribution among Joint Tortfeasors: A Pragmatic Criticism*, and *Replication*, 54 Harv. L. Rev. 1156 and 1178 (1941) with Gregory, *Contribution among Joint Tortfeasors: A Defense* and *Rejoinder*, 54 Harv. L. Rev. 1170 and 1184 (1941).

far from synonymous where consent to suit against the Government is concerned—the distinction between tort claims and claims for contribution is not merely academic or historical. Because the right of contribution is distinct from that of a tortiously injured plaintiff, its enforcement against the Government would entail consequences nowhere foreseen in the Tort Claims Act. We believe that a recognition of these potential consequences lends added weight to the conclusion required by the language of the Act—that the consent it expresses does not include consent to suits for contribution.

1. As we have seen, a cause of action for contribution does not accrue until the contributee has paid more than his share of the obligation for which contribution is sought. *Supra*, pp. 34–35. Accordingly, it is well established that the statute of limitations does not begin to run against such a claim until the payment has been made. *Adam* v. *Vacquier*, 48 F. Supp. 275 (W. D. Pa.); *Harris* v. *Buder*, 326 Ill. App. 471; *In re Trust of Lunt*, 237 Iowa 1097; *Masheter* v. *Lanning*, 151 Kan. 604; *Godfrey* v. *Power Co.*, 223 N. C. 647; *Wilson* v. *Crutcher*, 176 Okla. 481; 3 Moore, *Federal Practice* (2d ed., 1948) pp. 421–422; cf. *Ainsworth* v. *Berg*, 253 Wis. 438, mandate vacated and judgment modified, 253 Wis. 445a. If the Tort Claims Act is construed to permit contribution, the Government may thus be sued some unspecified num-

ber of years after the injured plaintiff could no longer sue.[16]

But Congress, while leaving the liability of the United States to be determined in other respects according to local law, was sufficiently concerned with the avoidance of stale claims to write a uniform statute of limitations into the Tort Claims Act. Originally one year (Sec. 420 of the Act, 60 Stat. 845), now two years (28 U. S. C. 2401 (b), as amended by Section 1 of Pub. L. No. 55, 81st Congress., 1st Sess., April 25, 1949) from the time when the claim accrues, this limitation period was apparently decided upon with particular reference to the special problems of tort litigation. See Hearings before Subcommittee No. 1 of the Committee on the Judiciary, House of Representatives, 76th Cong., 3d Sess., on H. R. 7236, p. 21; H. Rep. No. 1754, 80th Cong., 2d Sess., p. 2. The obvious reason for the characteristically short limitation periods applied to

[16] If, as we have urged in Point I, *supra*, joinder of the United States as a third-party defendant is impermissible, most suits for contribution would probably be brought several years after the injury and after the injured plaintiff's suit would be barred by the two-year limitation of 28 U. S. C. 2401 (b) as amended by Pub. L. No. 55, 81st Cong., 1st Sess., April 25, 1949, Section 1. And even if joinder is permitted it is not compulsory; indeed, there would be many cases in which it was impossible—*e. g.*, cases brought in the state courts and cases in which compliance with the venue provision of the Tort Claims Act was impossible (see pp. 21–22 *supra*).

tort actions is the difficulty of gathering evidence any considerable period after an accident.

The problem of reconciling the statute of limitations contained in the Tort Claims Act with the asserted propriety of claims for contribution involves readily apparent difficulties. It could be suggested that the overriding purpose of Congress in limiting the time for bringing suit requires that a limitation period of two years from the time of the accident be applied to all suits, including suits for contribution. But this would mean in many cases that the claim for contribution would be extinguished before its accrual. If, on the other hand, the limitation period on a claim for contribution is held to run from the time the claim may be sued upon, the evident objective of Congress to limit sharply the period between the event causing the injury and the commencement of litigation—is thwarted. Moreover, the time elapsed between injury and suit—with which Congress was primarily concerned—would be largely determined by applicable state statutes of limitation on tort claims, and by the expedition with which tort suits were disposed of by state as well as federal courts. The important consideration here, at any rate, is that neither of the hypothetical alternatives is suggested by, or demonstrably compatible with, the Tort Claims Act. This is so, we believe, because Congress had no notion that it was consenting to suits for contri-

bution and had no occasion therefore to consider the special problems entailed by such consent. On this view, the Act's provision limiting the time for suit is simple and quite adequately phrased, reading in its present formulation (28 U. S. C. 2401 (b), as amended by Pub. L. No. 55, 81st Cong., 1st Sess., Section 1): "*A tort claim* against the United States shall be forever barred unless action is begun within two years after such claim accrues * * *."[17] [Italics added.]

2. Because the right of contribution is distinct from the injured plaintiff's right, the conclusion that the United States has consented to suits for contribution may subject the Government to liability under the Tort Claims Act in cases where it has successfully defended against the claim of the injured plaintiff. Assume, for example, an accident involving a vehicle driven by a Government employee and another vehicle driven by D, and a resulting injury to P. Assume, then, a suit by P against the Government in which the Government is held not to be liable on the ground that its employe was not negligent. Having failed to prove negligence on the part of the Government employee, P may then sue and recover from D. At this point, since the suit between P and the Gov-

[17] The Reviser's Notes to 28 U. S. C. 2401 (b) state that this subsection merely "simplifies and restates" Section 420 of the Tort Claims Act "without change of substance." H. Rep. No. 308, 80th Cong., 1st Sess., p. A185. Pub. L. No. 55 increased the time for suit from one year to two.

ernment in no way binds D, he may now seek contribution from the Government, relitigating the question of the Government employee's negligence. *Canestrino* v. *Powell*, 231 N. C. 190; *Bakula* v. *Schwab*, 167 Wis. 546; see *Yellow Cab Co. of D. C.* v. *Janson*, 179 F. 2d 54, 55 (C. A. D. C.); *Warren* v. *Boston & Maine Railroad*, 163 Mass. 484, 485–486; Gregory, *Contribution Among Tortfeasors: A Uniform Practice*, 1938 Wis. L. Rev. 365, 386.

This same possibility now exists, of course, for a private tortfeasor. It points up sharply, however, the difference between tort claims and claims for contribution. It compels the recognition that, if the Tort Claims Act be construed as permitting suits for contribution, the Government may successfully defend a claim "on account of damage to or loss of property or on account of personal injury or death" only to be held liable to a tortfeasor who has been held answerable for the injured party's loss. We believe that a fair reading of the Tort Claims Act and its history affords no basis for the conclusion that Congress—wholly preoccupied with provision of a forum for the adjudication of tort claims against the Government—was prepared to assume this additional liability.

3. Congress provided in Section 403 (d) of the Tort Claims Act (60 Stat. 843, now 28 U. S. C. 2672) that the acceptance by a claimant of an

administrative award or a compromise or settlement of his claim by the Attorney General should

> constitute a complete release by the claimant of any claim against the United States and against the employee of the Government whose act or omission gave rise to the claim, by reason of the same subject matter.

If it were held, however, that suits for contribution are maintainable under the Act, the Government would still be liable in many jurisdictions for the payment of an additional judgment after securing a release from the injured person. Ark. Stat. Ann. (1947), sec. 34–1005; Haw. Rev. Laws (1945), sec. 10491; Md. Ann. Code (1947 Cum. Supp.), Art. 50, sec. 25; N. M. Stat. Ann. (1949 Cum. Supp.), sec. 21–122; R. I. Laws 1940, c. 940, sec. 5; S. D. Laws 1945, c. 167, sec. 5; cf. *LaLone* v. *Carlin*, 139 Misc. 553, 247 N. Y. Supp. 665; *Blauvelt* v. *Village of Nyack*, 141 Misc. 730, 252 N. Y. Supp. 746. The foregoing statutes all enact Section 5 of the Uniform Contribution Among Tortfeasors Act, which provides:

> A release by the injured person of one joint tortfeasor does not relieve him from liability to make contribution to another joint tortfeasor unless the release is given before the right of the other tortfeasor to secure a money judgment for contribution has accrued, and provides for a reduction, to the extent of the pro rata share of the released tortfeasor, of the injured person's

damages recoverable against all the other tortfeasors.

This possibility of additional recovery by a concurrent tortfeasor after settlement with the injured person [18] was, we submit, wholly unforeseen and unintended by Congress when it made provision for the settlement and compromise of tort claims. Referring to the provision for administrative awards in predecessor bill (S. 2221, 77th Cong., 2d Sess.), the House Committee on the Judiciary said (H. Rep. No. 2245, 77th Cong., 2d Sess., p. 9): "Acceptance of the award by the claimant will release both the Government and the employee from liability." Referring to the provisions for administrative award, compromise or settlement in the bill as it was finally enacted, Senate Report No. 1400, 79th Cong., 2d Sess., declared (at p. 32): "The acceptance of any award, compromise, or settlement releases both the Government and the employee from liability." Practically identical language had appeared in earlier reports on predecessor bills, H. Rep. No. 2245, 77th Cong., 2d Sess., p. 9; H. Rep. No. 1287, 79th Cong., 1st Sess., p. 4. These ex-

[18] It may well be that the result achieved by Section 5 of the Uniform Contribution Act might not obtain in other jurisdictions where a right to contribution is recognized but the Uniform Act is not in effect. See, *e. g.*, *McKenna* v. *Austin*, 134 F. 2d 659, 665 (C. A. D. C.). However, the question now before this Court can be decided correctly only by reference to the varying incidents of the right of contribution as it exists according to the local laws of the several states.

pressions, we believe, mean what they say, and what the statute as enacted clearly intends—that settlements with tort claimants should release "the Government * * * from liability." Congress appropriately believed that releases would have this effect because it intended that only tort claims would be maintainable under the Act. And so the statute says, simply, that a settlement "shall constitute a complete release of *any* claim against the United States and against the employee of the government whose act or omission gave rise to *the* claim, by reason of the same subject matter." 28 U. S. C. 2672 (italics added). This language contemplates a single claim, the claim of an injured tort claimant, and no other; it intends the satisfaction of such a claim to end *any* right of suit relating to the same "act or omission" of a government employee. To permit the assertion against the United States of the additional, independent right to contribution would be flatly inconsistent with this clear intention.

4. Under Point I we have discussed the problem presented by the fact that the Tort Claims Act provides for nonjury trial while private litigation commonly involves a jury. Pp. 16–19, *supra*. There we noted the dilemma presented by the situation where a party seeking contribution from the United States has been found liable to the injured party by a jury. To follow the

ordinary rule and hold this finding conclusive against the United States would be to determine an essential element of the suit for contribution by a jury verdict, a procedure forbidden by the Act. To relitigate the question would make possible the odd result of denying contribution, on the ground that he was not liable, to a party who has been forced to pay a judgment. We repeat this point here because, in addition to illustrating the unfeasibility of joinder under the Tort Claims Act, it helps to demonstrate the Act's inconsistency with claims for contribution, whether presented by third-party complaints or independent suits.

C. *The inclusion, and subsequent abandonment, of provisions in earlier bills for pro rata liability of the United States does not warrant the conclusion that suits for contribution were authorized by the Act*

More than four years before passage of the Tort Claims Act, some of the many predecessor bills contained provisions limiting the liability of the United States to a pro rata share where other parties were also liable for the injuries. It has been suggested that these provisions, together with a statement in a report of the House Judiciary Committee when it dropped such a provision from S. 2221, 77th Cong., 2d Sess., show a congressional intent to permit suits against the United States for contribution. See

Gottlieb, *The Federal Tort Claims Act—A Statutory Interpretation,* 35 Geo. L. J. 1, 27–29 (1946). Upon analysis, however, the insubstantiality of this suggestion becomes apparent.

Typical of the predecessor provisions in question was Section 306 of S. 2690, 76th Cong., 1st Sess., which read:

> If the damage, loss, injury, or death is caused under circumstances creating a legal liability on the part of some person other than an officer, agent, or employee of the Government or upon some corporation, State, or political subdivision, to pay damages therefor, jointly with the United States, then, and in that event, the recovery against the United States shall be only for the pro rata share of the damages in proportion to the number of parties, so jointly or severally liable.

Similar provisions appeared in later bills. H. R. 7236, 76th Cong., 1st Sess., sec. 306; H. R. 6463, 77th Cong., 2d Sess., sec. 403; S. 2221, 77th Cong., 2d Sess., sec. 403. When the last of these bills, S. 2221, emerged from the House Committee on the Judiciary, the section in question had been dropped. The Committee included the following explanation of this action in its report (H. Rep. No. 2245, 77th Cong., 2d Sess., p. 12):

> Section 403 of the Senate bill provided for proportionate liability of the United States where a Government employee was a joint tortfeasor with someone else. This

> provision is not contained in the recommended bill and in cases involving joint tortfeasors the rights and liabilities of the United States will be determined by the local law. However, as stated above, no person may be joined with the United States as a defendant.

In analyzing this fragment of a long legislative history, it is important to assess with some care the meaning of the provision for pro rata liability which was being deleted when the foregoing statement by the House Judiciary Committee was made.[19] The provision is so formulated as to seek but a single objective: to insure that the liability of the United States would be limited where other tortfeasors were involved. The language is such that it would have operated directly against the tort claimant, flatly limiting "the award or judgment against the United States * * * [to] only * * * the pro rata share of the damages in proportion to the number of parties so jointly or severally liable." It neither contemplated nor required suits by

[19] Section 403 of S. 2221, substantially identical with section 306 of S. 2690 (quoted *supra*, p. 46), read as follows:

"If the damage, loss, injury or death with respect to which a claim is made pursuant to this Act is caused under circumstances creating a legal liability on the part of some person other than an employee of the Government to pay damages therefor, jointly or severally with the United States, the award or judgment against the United States shall be only for the pro rata share of the damages in proportion to the number of parties so jointly or severally liable."

or against the United States for contribution, but limited recovery from the United States without the need for such suits. There is nothing in the section to indicate that the United States was to pay in full for injuries to tort claimants and then seek contribution from joint tortfeasors.[20] Instead, it was "the award or judgment against the United States" which was limited in the first instance.

Conversely, there is no substance in the contention that the abandoned provisions for pro rata liability purported to enlarge the jurisdiction created elsewhere in the bills by authorizing suits against the United States for contribution. Having limited the liability of the United States to the tort claimant where other tortfeasors shared responsibility for his injury, these provisions achieved their purpose. They did not take the further step of inviting—without regard to local law (see note 20, *supra*)—liability for contribution.

The statement of the House Committee, quoted above, that

> * * * in cases involving joint tortfeasors the rights and liabilities of the United States will be determined by the local law * * *

[20] It may be noted that any such supposed meaning, nowhere discoverable in the language of the section, would presumably have been applicable in states which recognize no right of contribution among joint tortfeasors.

is similarly devoid of support for the decision below. Read in isolation it might perhaps be construed to show that, at the time of the Report, over four years before enactment of the Tort Claims Act (H. Rep. No. 2245, 77th Cong., 2d Sess., was dated June 16, 1942), the House Judiciary Committee envisioned suits against the United States for contribution. We believe, however, that, when the statement is read as a whole (*supra*, p. 46) and in its context, such an interpretation becomes highly speculative at best and is of little weight in any case.

First, as we have shown, the provision which the House Committee was eliminating when it wrote the foregoing explanation was concerned, not with suits by or against the United States for contribution, but with a limitation upon the liability of the United States. The attention of the Committee was presumably directed at the time to that relatively narrow problem and not to the far more complex question whether and how suits for contribution might be maintained against the United States. In this connection, it is significant that Section 301 of S. 2221, the bill to which the last-quoted statement referred, limited recovery on the claims it would have authorized to $7,500. If the language quoted from the House Report had intended that suits for contribution could be maintained against the United States and "be determined by the local law," cases would

undoubtedly have been foreseen in which a party seeking contribution had paid a judgment far exceeding $15,000 and would therefore be entitled to more than $7,500 by way of contribution. But the Report makes no comment upon this obvious possibility. We suggest that the absence of any discussion of this or other problems we have mentioned is probably explained by the fact that the Committee was not thinking of contribution at all.

Secondly, in the very sentence following the reference to local law as governing "cases involving joint tortfeasors," the Committee repeated the frequently expressed insistance that no joinder of the United States with other defendants was to be permitted. If the Committee had in mind that it had just sanctioned suits for contribution, this would have been a pointlessly troublesome addendum. As we have shown (*supra,* pp. 25–26), the requirement that contribution suits be maintained as separate actions would have necessitated multiple litigation growing out of single transactions. Such a requirement, if it was intended, would necessarily have led to added expense and the embarrassment of inconsistent judgments. Presumably some more adequate explanation than the few words under discussion would have been forthcoming if this situation had been envisaged.

Finally, and most importantly, we think the House Committee's statement, never concurred in

by the Senate and never repeated in the voluminous history of the Tort Claims Act, could not, however interpreted, outweigh the language and scheme of the Act as actually written. As we have sought to demonstrate (*supra*, pp. 26–32), the language of the Act cannot fairly be read as consenting to suits for contribution, and contains no such ambiguity on this point as would justify decision on the basis of a single committee statement which is itself ambiguous. Cf. *Packard Co.* v. *Labor Board*, 330 U. S. 485, 492; *Gemsco, Inc.* v. *Walling*, 324 U. S. 244, 260. This is especially true here where the resulting construction would lead to complications and inconsistencies which are clearly seen upon examination of the Act itself, to have been unintended. See pp. 37–45, *supra*.

D. *The fact that suits by subrogees are permitted under the Tort Claims Act affords no basis for the decision below*

The court below (R. 44) finds support for its conclusion that the United States is liable for contribution under the Tort Claims Act in this Court's decision in *United States* v. *Aetna Surety Co.*, 338 U. S. 366, holding that the Act authorizes suits by subrogees. But analysis of the nature of a subrogee's right makes clear that the rule in the *Aetna* case is inapposite here.

A subrogee acquires the claim of his subrogor and nothing more. *United States* v. *Munsey*

Trust Co., 332 U. S. 234, 242; *United States* v. *American Tobacco Co.*, 166 U. S. 468, 474. Thus, the subrogee who sues under the Tort Claims Act sues precisely on the tort claim of his subrogor from whom the claim has been acquired. "Equitable subrogation is the enforcement of the original claim. It is not a separate claim; it is still the injured person's claim although enforced by another." *Insurance Co. of North America* v. *United States*, 76 F. Supp. 951, 953 (E. D. Va.); *Niagara Fire Ins. Co.* v. *United States*, 76 F. Supp. 850, 854, 855 (S. D. N. Y.). Because the subrogee stands in the shoes of his subrogor, a release by the subrogor bars suit by the subrogee. *Pacific Fire Ins. Co.* v. *Pennsylvania Sugar Co.*, 72 F. 2d 958 (C. A. 3), certiorari denied, 293 U. S. 623; *Seeder* v. *Zoros*, 315 Ill. App. 60; *Platt* v. *Richmond, Y. R. & C. R. R. Co.*, 108 N. Y. 358. As we have seen (*supra*, pp. 42–43), a release from the injured person does not afford the same protection against a suit for contribution. A judgment against the subrogor would bar suit by a subrogee, who sues only on whatever right the subrogor might have had (cf. *Smith* v. *Kernochen*, 7 How. 198; *Westgate* v. *Maryland Casualty Co.*, 147 F. 2d 177 (C. A. 6)), but a judgment against the injured person may leave a defendant still potentially liable in a suit for contribution. *Supra*, pp. 40–41. Where the statute of limitations has run against the claim of a

subrogor, this defense is available against the subrogee. *Brown* v. *Nelms*, 86 Ark. 368; *Maryland Casualty Co.* v. *Ladd*, 121 Kan. 659; *Garland* v. *Arrowood*, 172 N. C. 591; cf. *Chapman* v. *Griffth-Consumers Co.*, 107 F. 2d 263 (C. A. D. C.). But the independent right of contribution, which accrues only upon payment of more than a pro rata share of the liability for which contribution is sought, may only arise, and continues to subsist, long after the injured person's claim is barred. *Supra*, pp. 37–38. Cf. *The Conemaugh*, 135 Fed. 240 (N. D. Ill.); *Foster & Glassell Co.* v. *Knight Bros.*, 152 La. 596.

These substantial distinctions demonstrate why the decision to enforce tort claims in the hands of subrogees does not support the contention that the consent announced in the Tort Claims Act includes consent to suit on claims for contribution. They point up the propriety of Judge Medina's statement in *Niagara Fire Ins. Co.* v. *United States*, *supra*, at 855, that, while subrogees could sue under the Tort Claims Act, a wholly different situation is presented where a joint tortfeasor seeks to assert the "independent right" of contribution against the United States.

E. Decision under the Suits in Admiralty Act are irrelevant here.

The Suits in Admiralty Act (41 Stat. 525, 46 U. S. C. 741 *et seq.*) consents to libels *in personam* against the Government in all "cases where if

such vessel were privately owned or operated, * * * a proceeding in admiralty could be maintained * * *." 41 Stat. 525, 46 U. S. C. 742. This sweeping waiver includes "all maritime claims arising out of the possession or operation of merchant vessels of the United States." *Fleet Corporation* v. *Rosenberg Bros.*, 276 U. S. 202, 213. The Public Vessels Act (43 Stat. 1112, 46 U. S. C. 781 *et seq.*), consenting to libels "for damages caused by a public vessel of the United States" (43 Stat. 1112, 46 U. S. C. 781), incorporates the provisions of the Suits in Admiralty Act "insofar as the same are not inconsistent" (43 Stat. 1112, 46 U. S. C. 782). These statutes are not by their terms limited to either contract claims or tort claims or any other such category. See, *e. g.*, *Johnson* v. *Fleet Corporation*, 280 U. S. 320; *Eastern Transp. Co.* v. *United States*, 272 U. S. 675; *United States* v. *Loyola*, 161 F. 2d 126 (C. A. 9); *United States* v. *Caffey*, 141 F. 2d 69, 70 (C. A. 2), certiorari denied, 323 U. S. 750. Instead, they give authority "to sue generally 'in admiralty' * * *" (*Canadian Aviator, Ltd.* v. *United States*, 324 U. S. 215, 227) and consequently "impose on the United States the same liability (apart from seizure or arrest under a libel *in rem*) as is imposed by the admiralty law on the private shipowner * * *." *Id.* at 228.

Since the United States has exposed itself to liability for any kind of admiralty claim, and since the right to contribution "belongs to the substantive law of the admiralty" (*The Ira M. Hedges*, 218 U. S. 264, 270), there is nothing startling in the rule that the United States may be sued for contribution in admiralty. At the same time, there is nothing in this rule which supports the view that an Act consenting to suit on tort claims--and not on civil claims generally—permits suits for contribution.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgments below should be reversed.

PHILIP B. PERLMAN,
Solicitor General.
H. G. MORISON,
Assistant Attorney General.
JAMES L. MORRISSON,
Special Assistant to the Attorney General.
PAUL A. SWEENEY,
MARVIN E. FRANKEL,
Attorneys.

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APPENDIX

1. The Federal Tort Claims Act (60 Stat. 842), as originally enacted (see note 1, *supra*, p. 2), provided in pertinent part as follows:

> SEC. 403. (a) Subject to the limitations of this title, authority is hereby conferred upon the head of each Federal agency, or his designee for the purpose, acting on behalf of the United States, to consider, ascertain, adjust, determine, and settle any claim against the United States for money only, accruing on and after January 1, 1945, on account of damage to or loss of property or on account of personal injury or death, where the total amount of the claim does not exceed $1,000, caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death, in accordance with the law of the place where the act or omission occurred.
>
> (b) Subject to the provisions of part 3 of this title, any such award or determination shall be final and conclusive on all officers of the Government, except when procured by means of fraud, notwithstanding any other provision of law to the contrary.
>
> (c) Any award made to any claimant pursuant to this section, and any award, compromise, or settlement of any claim cognizable under this title made by the

Attorney General pursuant to section 413, shall be paid by the head of the Federal agency concerned out of appropriations that may be made therefor, which appropriations are hereby authorized.

(d) The acceptance by the claimant of any such award, compromise, or settlement shall be final and conclusive on the claimant, and shall constitute a complete release by the claimant of any claim against the United States and against the employee of the Government whose act or omission gave rise to the claim, by reason of the same subject matter.

* * * * *

SEC. 410. (a) Subject to the provisions of this title, the United States district court for the district wherein the plaintiff is resident or wherein the act or omission complained of occurred, including the United States district courts for the Territories and possessions of the United States, sitting without a jury, shall have exclusive jurisdiction to hear, determine, and render judgment on any claim against the United States, for money only, accruing on and after January 1, 1945, on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death in accordance with the law of the place where the act or omission occurred. Subject to the provisions of this title, the United States shall be liable in respect of such claims to the same claim-

ants, in the same manner, and to the same extent as a private individual under like circumstances, except that the United States shall not be liable for interest prior to judgment, or for punitive damages. Costs shall be allowed in all courts to the successful claimant to the same extent as if the United States were a private litigant, except that such costs shall not include attorneys' fees.

* * * * *

SEC. 411. In actions under this part, the forms of process, writs, pleadings, and motions, and the practice and procedure, shall be in accordance with the rules promulgated by the Supreme Court pursuant to the Act of June 19, 1934 (48 Stat. 1064); and the same provisions for counterclaim and set-off, for interest upon judgments, and for payment of judgments, shall be applicable as in cases brought in the United States district courts under the Act of March 3, 1887 (24 Stat. 505).

SEC. 412. (a) Final judgments in the district courts in cases under this part shall be subject to review by appeal—

(1) in the circuit courts of appeals in the same manner and to the same extent as other judgments of the district courts; or

(2) in the Court of Claims of the United States: *Provided,* That the notice of appeal filed in the district court under rule 73 of the Rules of Civil Procedure shall have affixed thereto the written consent on behalf of all the appellees that the appeal be taken to the Court of Claims of the United States. Such appeals to the Court of Claims of the United States shall be taken within three months after the entry of the judgment of

the district court, and shall be governed by the rules relating to appeals from a district court to a circuit court of appeals adopted by the Supreme Court pursuant to the Act of June 19, 1934 (48 Stat. 1064). In such appeals the Court of Claims of the United States shall have the same powers and duties as those conferred on a circuit court of appeals in respect to appeals under section 4 of the Act of February 13, 1925 (43 Stat. 939).

* * * * *

SEC. 420. Every claim against the United States cognizable under this title shall be forever barred, unless within one year after such claim accrued or within one year after the date of enactment of this Act, whichever is later, it is presented in writing to the Federal agency out of whose activities it arises, if such claim is for a sum not exceeding $1,000; or unless within one year after such claim accrued or within one year after the date of enactment of this Act, whichever is later, an action is begun pursuant to part 3 of this title. In the event that a claim for a sum not exceeding $1,000 is presented to a Federal agency as aforesaid, the time to institute a suit pursuant to part 3 of this title shall be extended for a period of six months from the date of mailing of notice to the claimant by such Federal agency as to the final disposition of the claim or from the date of withdrawal of the claim from such Federal agency pursuant to section 410 of this title, if it would otherwise expire before the end of such period.

* * * * *

2. Rule 14 (a) of the Federal Rules of Civil Procedure provides as follows:

> Before the service of his answer a defendant may move ex parte or, after service of his answer, on notice to the plaintiff, for leave as a third-party plaintiff to serve a summons and complaint upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. If the motion is granted and the summons and complaint are served, the person so served, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in Rule 12 and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule 12 and his counterclaims and cross claims as provided in Rule 13. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant.

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IN THE

Supreme Court of the United States

October Term, 1950.

No. 218.

UNITED STATES OF AMERICA,
Petitioner,

v.

YELLOW CAB COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals
For the Third Circuit.

Brief of the Yellow Cab Company.

WM. A. SCHNADER,
BERNARD G. SEGAL,
JAMES J. LEYDEN,
Attorneys for Respondent.

SCHNADER, HARRISON, SEGAL & LEWIS,
1719 Packard Building,
Philadelphia 2, Pa.,
Of Counsel.

International, 236 Chestnut St., Phila. 6, Pa.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1950.

No. 218.

UNITED STATES OF AMERICA,

Petitioner,

v.

YELLOW CAB COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Brief of the Yellow Cab Company.

OPINIONS BELOW.

The findings of fact and conclusions of law of the United States District Court for the Eastern District of Pennsylvania on the pleadings and proof (R. 12, 13) and the opinion of that Court on the motion of the United States to set aside the verdict (R. 14-16) are not reported.

The opinion of the United States Court of Appeals for the Third Circuit (R. 35-45) is reported at 181 F. (2d) 967.

JURISDICTION.

The jurisdiction of this Court rests upon 28 U. S. C. 1241 (1), this Court having granted the petition of the United States for writ of certiorari on October 9, 1950.

QUESTIONS PRESENTED.

I. Whether the Federal Tort Claims Act of 1946 subjects the United States to liability for contribution to a joint tortfeasor where the tort was committed in a state in which one joint tortfeasor has a substantive legal right to contribution from the other?

II. Whether under the Federal Tort Claims Act of 1946, the individual tortfeasor, sued in a federal district court, may join the Government as a third-party defendant to enforce his right to contribution?

STATUTE INVOLVED.

This case involves the Federal Tort Claims Act of 1946, 60 Stat. 842 U. S. Code, 1946 Ed., Title 28, Sections 921-46, which is set forth in full in the Appendix, *infra*, pp. 42-45.

STATEMENT.

On December 1, 1946, at a street intersection in Philadelphia, Pennsylvania, a United States mail truck, failing to stop at the intersection, although a "Stop" sign at the intersection required that it do so before proceeding through the intersection, collided with a taxicab of the respondent (R. 12). The original plaintiffs, passengers in the taxicab, commenced suits against the Yellow Cab Company in the United States District Court for the Eastern District of Pennsylvania, there being the required diversity of citizenship and the requisite amounts in controversy.

By leave of court, respondent was permitted to join the United States as a third-party defendant in order to protect its right to contribution (R. 5).

The Government's motions to dismiss the third-party complaints on the ground that they assert derivative claims unauthorized by the Tort Claims Act were denied. The

cases proceeded to trial before a judge without a jury and resulted in findings of fact by the court that the accident was caused by the joint negligence of the drivers of the respective vehicles. Judgments totalling $7800.00 were awarded the plaintiffs against respondent and judgments for one-half of that amount, $3900.00, were entered in favor of respondent against the United States.

The Government's motions to set aside the verdicts and judgments against it were denied, and on appeal, the judgments of the District Court were affirmed by a unanimous court.

The court below concluded that although it seems possible that the language of Section 1346 (b) of revised Title 28, United States Code, may be somewhat narrower in effect than the pertinent portions of Section 410 (a) of the Federal Tort Claims Act, 28 U. S. C. (1946 ed.) Section 931 (a), that issue was not before it, the rights of the parties having accrued before September 1, 1948 (R. 38).

The court then considered the cases as if the primary issue were whether the Federal Tort Claims Act of 1946 permitted a plaintiff to join the United States and an individual as defendants, stating, however, that the question presented was "in reality" whether the United States was liable to contribution (R. 36). The court concluded that (1) joinder of the United States and an individual as defendants was authorized by the Act (R. 43), and (2) in view of the broad, sweeping waiver of sovereign immunity, with liability on the Government as if it were a private individual, contribution, not being within any of the excepted categories of claims, was cognizable, and could be enforced by impleading the United States as a third-party defendant (R. 43-45).

SUMMARY OF ARGUMENT.

The Federal Tort Claims Act was passed by Congress in 1946, 60 Stat. 842, U. S. Code, 1946 Ed., Title 28, Sections 921-46. By that Act, Congress lifted the immunity of the sovereign from suit on claims in negligence and tort generally,—a legislative reform long overdue.

The language adopted by Congress in Section 410 (a) of the Act clearly demonstrated an intent to waive governmental immunity from suit on claims in every phase of negligence liability and to place the Government on a parity with private individuals.

That section made the United States liable on "any claim * * * accruing * * * on account of damage to or loss of property or on account of personal injury or death * * * under circumstances where the United States, if a private person, would be liable to the claimant * * * in accordance with the law of the place where the act or omission occurred" and further stated that the United States "shall be liable in respect to such claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances", except as to interest prior to judgment or punitive damages.

A clearer or more sweeping waiver of governmental immunity to suit could not be easily phrased. The United States was made liable if a private individual would be liable. Therefore, where the tort occurs in a state in which contribution between joint tortfeasors is a substantive legal right,—as it is in Pennsylvania where the accident giving rise to the claims occurred,—the individual tortfeasor has a claim for contribution from its joint tortfeasor, the United States.

That Congress intended to waive immunity from suits on claims for contribution is further made evident by the

fact that in Section 421, twelve categories of claims were expressly excluded from operation of the Act. The language used in Section 421 was clear and showed painstaking care. It left no doubt that Congress knew the precise types of claims it desired to exempt, even to so remote a tort claim as one for damages caused by the fiscal operation of the treasury or by the regulation of the monetary system. Nevertheless, contribution was not mentioned.

In construing the Federal Tort Claims Act, this Court in **Brooks v. United States**, 337 U. S. 49, 51 (1949), forcefully pointing out that the statute's terms are clear and that it contains twelve specifically excepted categories of claims, refused to accept a contention that a type of claim not included in the twelve exceptions was intended to be excluded from operation of the Act. In **United States v. Aetna Casualty & Surety Co.**, 338 U. S. 366, 383 (1949), this Court, in refusing to hold as an excluded class another type of liability not mentioned in the twelve exceptions, reiterated the doctrine that where consent of the sovereign from suit has been announced, it should not be narrowed by refinement of construction.

To grant the Government's contention in this case would require judicial amendment of the Federal Tort Claims Act by the addition of a thirteenth category of liability to the twelve specifically excluded in Section 421.

Since the language in the Federal Tort Claims Act is clear and unambiguous, resort to legislative history is inappropriate. Nevertheless, in its brief, the Government devotes many pages to the legislative history of this Act, and prior bills which never became law, in an attempt to show that the Act does not mean what it says. And in doing so, it has had to explain away more than it has been able to adduce in its favor.

Actually, the history of bills providing waiver of the sovereign immunity of the United States from claims on account of personal injury or death contains so many vac-

illations as to what should and what should not be in the Act that it is not really very helpful at all. Certainly the legislative history does not show an intent to prohibit impleader of the United States as a third party defendant. On the contrary, Senate Report No. 1400, 79th Cong., 2nd Sess. (1946), accompanying Senate Bill 2177,—the Legislative Reorganization Act,—Section 4 of which contained, except for minor changes not pertinent here, the Federal Tort Claims Act as finally adopted, shows that whatever may have been intended in earlier bills, the concept of non-joinder was there discarded.

In that report,—Senate Report No. 1400, 79th Cong., 2nd Sess. (1946),—it is stated that "with respect to this type of claim the government should be put in the same position as any private party." Coupled with this language, there is in that report a deliberate deletion of the statement made in House Report No. 1287, 79th Cong., 1st Sess. (1945), accompanying H. R. 181, a bill then on the House Calendar, that joinder of the United States as a co-defendant was not to be permitted. That deletion in the Senate Report stands out because the substance of all of the paragraphs in the House Report, which preceded the non-joinder statement there made, were incorporated in the Senate Report.

So that in view of the broad, sweeping waiver of immunity, and the statement that liability of the United States was to be the same as that of a private individual unless the claim fell within the twelve categories of specifically excepted claims, it is clear the United States in this case is liable to contribution as a joint tortfeasor. And that liability was properly determined by impleading the United States as a third-party defendant.

This conclusion is supported by the practice in admiralty under Section 3 of the Suits in Admiralty Act, 46 U. S. C. A., Section 743, where the language employed is very similar to that contained in Section 410 (a) of the

Federal Tort Claims Act and where it is conceded that the United States can be impleaded by a respondent under Admiralty Rule 56.

Finally, the liability for contribution imposed by the broad language in the Act cannot be avoided by conjuring up conceivable procedural difficulties, more seeming than real, which may arise in other cases. Even assuming *arguendo* that such other cases might pose procedural difficulties if they arose, they furnish no justification for judicial amendment of the Act, however much they might justify legislative correction in the future.

Argument.

I.

WHERE CONTRIBUTION BETWEEN JOINT TORT FEASORS IS A SUBSTANTIVE LEGAL RIGHT UNDER THE LEX LOCI DELICTI, THE TORT CLAIMS ACT PERMITS JOINDER OF THE GOVERNMENT IN A FEDERAL COURT TO ENFORCE CONTRIBUTION.

A. In Adopting the FTCA, Congress Exposed the United States to Claims in Every Phase of Negligence Liability to Which a Private Individual Is Subject, Unless the Claim Falls Within One of the Categories of Claims Specifically Exempt.

The Federal Tort Claims Act was passed by Congress in 1946, 60 Stat. 842, U. S. Code, 1946 Ed., Title 28, Sections 921-46. By that Act, Congress lifted the immunity of the sovereign from suit on claims in negligence and tort generally,—a legislative reform long overdue.[1]

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[1] As early as February 28, 1832, John Quincy Adams wrote: "There ought to be no private business before Congress. * * * A deliberative assembly is the worst of all tribunals for the administration of justice." 8 **Memoirs of John Quincy Adams** (1876) 479-480.

The Court of Claims had been established on February 24, 1855, 10 Stat. 612, 28 U. S. C. A., sections 241 et seq., for the chief purpose of entertaining suits on contract against the Government. By Act of March 3, 1887, 24 Stat. 505, 28 U. S. C. A., section 41 (20), commonly referred to as the Tucker Act, concurrent jurisdiction with the Court of Claims was conferred on the United States District Courts over contract claims and other claims "not sounding in tort," against the Government not involving more than $10,000. By the Act of June 25, 1910, 36 Stat. 851, 35 U. S. C. A., section 68, the Government submitted itself to suit for patent infringement.

The plain language of Section 410 (a) of the Tort Claims Act is conclusive of the issues in this case. A clearer or more sweeping waiver of governmental immunity to suit could not be easily phrased.

Section 410 (a) reads as follows (Appendix, p. 42):

"Subject to the provisions of this chapter, the United States district court for the district wherein the plaintiff is resident or wherein the act or omission complained of occurred, including the United States district courts for the Territories and possessions of the United States, sitting without a jury, shall have exclusive jurisdiction to hear, determine, and render judgment on **any claim**[2] against the United States, for money only, accruing on and after January 1, 1945, on account of damage to or loss of property or **on account of personal injury or death** caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, **under circumstances where the United States, if a private person, would be liable to the claim-**

The first departure from immunity against suits in tort was made in 1920 by the Suits in Admiralty Act, 41 Stat. 525, 46 U. S. C. A., Section 742, by which the Government subjected itself to suit in the district courts in respect to admiralty and maritime torts involving merchant vessels owned or operated by the Government. This jurisdiction was later extended to include damage caused by public vessels of the United States, 43 Stat. 1112, 46 U. S. C. A., section 781, known as the Public Vessels Act.

Between 1925 and 1935, eighteen tort claims bills were introduced in Congress. See **Brooks v. United States**, 337 U. S. 49, 51, footnote 2. From 1935 to 1946 such bills were regularly introduced. See Hearings before the Committee on the Judiciary, 77th Cong., 2nd Sess., on HR 5373 and HR 6463.

[2] Wherever boldface type appears in this brief the emphasis is ours.

ant for such damage, loss, injury, or death in accordance with the law of the place where the act or omission occurred. Subject to the provisions of this chapter, the **United States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances**, except that the United States shall not be liable for interest prior to judgment, or for punitive damages. Costs shall be allowed in all courts to the successful claimant to the same extent as if the United States were a private litigant, except that such costs shall not include attorneys' fees."

We do not believe that Congress could have stated more clearly its intent that the United States be subject to liability if a private person would be subject to liability under the law of the *lex loci delicti.*

Accordingly, where the United States and an individual are joint tortfeasors, we submit that a claim for contribution against the United States falls within Section 410 (a) of the Act,—if a private individual would be subject to such liability. If there were any doubt that the language of Section 410 (a), standing alone, was intended to include the right to contribution, that doubt was removed by Congress in Section 421. In that Section, there were enumerated 12 categories of claims to which the Act would not apply. The language used by Congress in enumerating those exempt categories of claims is clear. It shows painstaking care, and leaves no doubt that Congress knew which types of claims it desired to exempt. Contribution is not mentioned.

Section 421 (d) excepted any claim for which a remedy is provided by sections 741-742 or 781-790 of Title 46, relating to claims or suits in admiralty against the United States (Appendix, p. 46). Section 421 (h) excepted any claim arising out of assault and battery, false imprison-

ment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights (Appendix, p. 46). Section 421 (c) excepted claims arising with respect to the assessment or collection of tax or customs duties (Appendix, p. 46). Section 421 (e) excepted any claim arising out of an act or omission of an employe of the government in administering the provisions of Sections 1-38 of the Appendix to Title 50, which includes the Trading with the Enemy Act of 1917 (Appendix, p. 46). Section 421 (i) excepted any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system (Appendix, p. 47). Despite the apparent care with which these exceptions were drafted and some of the rather remote forms of liability covered by them, no exception pertaining to contribution was listed.

The clear import of the inclusion in the Act of those specific categories of excepted claims was stated by this court in **Brooks v. United States**, 337 U. S. 49 (1949). In that case a soldier on leave was killed in a collision between the automobile in which he was riding and a United States Army truck. The lower court entered judgment for the decedent's estate in the suit brought against the United States. The Court of Appeals, Judge Parker dissenting, reversed the judgment, reasoning that in passing the Federal Tort Claims Act, Congress never intended to permit one of its soldiers to sue the Government. This Court, in reversing the action of the Court of Appeals, said, page 51:

> "We agree with Judge Parker. The statute's terms are clear. They provide for District Court jurisdiction over *any* claim founded on negligence brought against the United States. We are not persuaded that 'any claim' means 'any claim but that of servicemen.' The statute does contain twelve exceptions. § 421. None exclude petitioners' claims. One is for claims arising in a foreign country. A second excludes claims arising out of combatant activities of the military or

naval forces, or the Coast Guard, during time of war. These and other exceptions are too lengthy, specific, and close to the present problem to take away petitioners' judgments. Without resorting to an automatic maxim of construction, such exceptions make it clear to us that Congress knew what it was about when it used the term 'any claim.' It would be absurd to believe that Congress did not have the servicemen in mind in 1946, when this statute was passed. The overseas and combatant activities excepti ns make this plain."

When the **Brooks** Case was before the Court of Appeals, Judge Parker, in his dissent had said, 169 F. (2d) 840, 847-848:

"The principal question in the case is whether the court shall read into the act an exception excluding soldiers from the right to recover under its provisions. I see no basis for reading such an exception into the act. Legislation is a matter for Congress, not for the court; and the language used by Congress clearly covers soldiers as well as civilians. It is neither reasonable nor respectful to Congress for the courts to assume that the import of the general language used in the statute was not understood or that language excluding soldiers from the benefit of the act was omitted through inadvertence. • • •

• • • • • •

"Another reason for holding that it was not the intention of Congress to exclude soldiers from the protection afforded by the act is that the act itself lists twelve exceptions to its application under the heading of exceptions and no such exception is listed among them. • • •"

In the present case, there was a collision between a taxicab and a United States mail truck as a result of which

personal injuries were sustained by passengers in the taxicab. In Pennsylvania contribution between joint tort feasors is a substantive legal right. **Fisher v. Diehl,** 156 Pa. Superior Ct. 476, 482 (1944); **Contribution Among Tort-Feasors Act,** June 24, 1939, P. L. 1075, sec. 1, 12 P.S. § 2081; **Goldman, et al. v. Mitchell-Fletcher Company,** 292 Pa. 354 (1928).

The trial court, sitting without a jury, found that the driver of the taxicab and the driver of the mail truck were joint tortfeasors. It entered judgments against the Yellow Cab Company in favor of the plaintiffs, and in turn entered judgments for half the various sums in favor of the Cab Company against the Government.

That, we submit, was the only course which the court could have pursued. To have granted the Government's motion to set aside the verdicts would not have been a strict construction of the Federal Tort Claims Act; it would have constituted an amendment to it.

To paraphrase the holding of this Court in the **Brooks** Case, *supra,* the statute's terms were clear and provided for district court jurisdiction over **any** claim founded on negligence against the United States, except the twelve specifically excepted categories. "Any claim" does not mean any claim except that of a joint tortfeasor asserting his right to contribution against the Government, the joint tort having occurred in a state in which the right to contribution is a substantive legal right. Collision cases make up the bulk of litigated tort claims.[3] Yet such cases were not included in the list of 12 exceptions which Congress incorporated into the Act.

The court below adopted this view (Chief Judge Biggs at R. 43, 44):

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[3] For a case in which this fact was adduced as further evidence of a Congressional intent not to exclude such cases, see **Englehardt v. United States, et al.,** 69 F. Supp. 451, 454 (D. C. Md., 1947).

"• • • But could contribution from the sovereign to Yellow Cab fall within the purview of the FTCA? Did the waiver of immunity by the sovereign go so far? We think that it did.

"The provisions of Section 410 (a) • • • seem conclusive in this connection for that section conferred exclusive jurisdiction upon the United States district courts to render judgment on any claim against the United States 'on account of personal injury . . .'. Note that the jurisdiction of the United States district courts was not limited to the adjudication of *claims for damages.* The word 'claimant' used in the statute was employed to designate any person who might assert the claim and was *not* limited to one who had sustained damage to his property or injury to his person. In other words a 'claimant' in the eye of the statute was any one who had a claim against the United States *on account* of personal injury or damage to property. Broader phrases or words more likely to embrace liability generally are difficult to imagine. A joint tortfeasor would have a claim on account of personal injury as would a subrogee. This point was settled by the decision of the Supreme Court in United States v. Aetna Surety Co., *supra.* It would seem to have been the intention of Congress to put the United States on a precise parity with the private litigant in suits cognizable under the FTCA. See Moore's Federal Practice, 2nd ed., Vol. 3, pp. 2730-2739."

There are numerous other decisions in which the courts have similarly interpreted the Congressional intent as expressed in this very act.

Courts of Appeals in seven circuits did so in subrogee cases. Those holdings were approved by this Court in **United States v. Aetna Casualty & Surety Co.**, 338 U. S. 366 (1949).

In that case, Chief Justice Vinson said, 338 U. S. 383:

> "• • • In argument before a number of District Courts and Courts of Appeals, the Government relied upon the doctrine that statutes waiving sovereign immunity must be strictly construed. We think that the congressional attitude in passing the Tort Claims Act is more accurately reflected by Judge Cardozo's statement in *Anderson v. Hayes Construction Co.*, 243 N. Y. 140, 147, 153 N. E. 28, 29-30: 'The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced.'"

At another portion of this brief (pages 33 to 38), we answer the contention in the government's brief that the fact suits by subrogees are permitted under the Torts Claims Act affords no basis for allowing claims of contribution against the government as a joint tortfeasor. Here we merely quote from two of the opinions of Courts of Appeals sustaining claims by subrogees, because the construction of the Torts Claims Act there applies with equal force to the present situation.

In **Old Colony Insurance Co. v. United States**, 168 F. (2d) 931 (C. A. 6th, 1948) (in which the plaintiff was a subrogee by virtue of payment under a policy of collision insurance), the court said at page 933:

> "**There is nothing ambiguous in the quoted section of the Act. The language used is plain, its meaning is certain and easily understood. There is no room for construction and the contention that because defendant has consented to be sued, the statute must be strictly construed in its favor, is without basis.** See Employers' Fire Ins. Co., et al. v. U. S. 9 Cir., 167 F. 2d 655. The word 'claimant' simply means one who under the Act has a claim against the United States. The phrase 'on

any claim against the United States, for money only, * * * on account of damage to or loss of property * * * caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment' means just what it says. **The Act does not limit the meaning of the word 'claimant' to one who has sustained damage to his property and we are not justified in reading such limitation into it.** See Wojciuk v. United States, D. C., 74 F. Supp. 914. **To do so would be tantamount to amendment by us of the statute, a function which of course is not ours.** As was said by District Judge Medina in Niagara Fire Ins. Co., et al. v. United States, D. C., S. D., 76 F. Supp. 850, 854—'* * * there is every reason to suppose that this particular statute was the result of the most skillful and deliberate draftsmanship and that in its final form it was the culmination of years of patient effort.' **If Congress had intended to exclude subrogees from the benefits of the Act it could readily have included them in the list of the twelve specified exemptions.**"

And in **Aetna Casualty and Surety Co. v. United States,** 170 F. (2d) 469 (C. A. 2nd, 1948) (in which the plaintiff was a subrogee by operation of law under the New York Workmen's Compensation Law), the Court said, p. 472:

"* * * We think, however, that the reiterated requirement that we should treat the United States like a private individual is the more fundamental, and the Congress did not intend to limit the jurisdiction of the district courts more than it is limited by the specific exceptions."

So also in cases in which the plaintiff has joined the United States and an individual as joint tortfeasor defendants. **Englehardt v. United States, et al.,** 69 F. Supp.

451, 452, (D. C. Md., 1947); **Bullock, et al. v. United States, et al.**, 72 F. Supp. 445 (D. C. N. J., 1947); **State of Maryland v. Manor Real Estate and Trust Co., et al.**, 83 F. Supp. 91 (D. C. Md., 1949); **Bates v. United States**, 76 F. Supp. 57, 59 (D. C. Neb., 1948).

We submit that the words adopted by Congress in the Act show a clear intent to waive the sovereign's immunity from suit in all facets of tort and negligence law, with twelve categories of claims excepted; that in claims not falling within the exceptions, the liability of the United States is the same as that of a private individual under the same circumstances; that contribution is a substantive legal right under the law of Pennsylvania; that under the circumstances existing in this case, a private person would be subject to liability to respondent for contribution; that a claim for contribution is not one of the categories of claims from which the Act exempts the United States; and that the United States, therefore, is liable to respondent for contribution.

The only remaining question is whether that right to contribution may be enforced by joinder of the government as a third-party defendant. We cannot improve upon what was said by the Court below on this subject (R. 44):

> "* * * The Pennsylvania law and practice do not require the existence of a joint judgment before a claim for contribution can be enforced against the joint tort-feasor. The Pennsylvania third-party practice is within the purview of Rule 14 (a), FRCP. Separate suits could have been filed against the United States by Yellow Cab, the United States being the sole defendant, and judgments of contribution could thus have been obtained by Yellow Cab. The principle of United States v. Sherwood, 312 U. S. 584, 587-8, arising under the Tucker Act, would be inapplicable even by way

of analogy for such judgments would have been obtained in suits in which the United States was the sole defendant. In the instant cases the learned trial judge could have terminated the proceedings after judgments had been rendered in favor of the Gutmanns and the Howeys against Yellow Cab, and then could have proceeded to give separate trials to the United States on the issue of contribution. Surely the stricture of the Sherwood case, even if it were deemed to be applicable to cases involving joinder of the United States arising under the FTCA, would not serve to require second, separate trials with the United States as the sole defendant, the issue being one of contribution, for such second, separate trials would embrace the same evidence as that already received and would be conducted before the same judge. Cf. United States v. Aetna Surety Co., *supra.*"

The practice for joinder of a third party defendant is provided by Rule 14 of the Federal Rules of Civil Procedure. Section 411, of the Tort Claims Act specifically incorporates by reference the Federal Rules of Civil Procedure except as to "counterclaim and set-off, for interest upon judgments, and for payment of judgment." In the four quoted exceptions, Section 411 provided that the Tucker Act was to apply.

Here again, the express inclusion of four instances in which the Federal Rules of Civil Procedure were not to apply, and the failure to exclude Rule 14, evidences a Congressional intent that third party joinder of the United States under the Federal Rules be permitted. Although the court below did not consider this very persuasive, nevertheless this reasoning would appear to be implicit in the application by this Court in **United States v. Aetna Casualty and Surety Co.**, 338 U. S. 366, 380 (1949) of Rule 17 (a) of the Federal Rules of Civil Procedure in arriving at the holding of that case.

We also suggest that the similiarity between the language adopted by Congress in the Federal Tort Claims Act and that in the Suits in Admiralty Act, 46 U. S. C. A., Section 743, under which the United States can be impleaded under Admiralty Rule 56, showed an intent to subject the Government to claims for contribution, such claims to be assertable by joining the United States as a third-party defendant.

The pertinent section of the Suits in Admiralty Act, 46 U. S. C. A., Section 743, provides:

> "Such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties. * * *"

Note the similarity in language to Section 410 (a) of the FTCA which provide for liability in "any claim * * * under circumstances where the United States, if a private person, would be liable * * * the United States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances * * *".

The comparison and effect of this language in these two acts is discussed by the Court below (R. 42, 43).

We submit, therefore, that contribution is a claim cognizable under the FTCA and that it is properly asserted by impleading the United States as a third-party defendant.

B. The Legislative History of the FTCA Shows No Intent to Prohibit Impleader of the United States as a Third-Party Defendant.

It is hornbook law that where the meaning of the language in a statute is clear and unambiguous, resort to legislative history is inappropriate. **Packard Motor Car Co. v. National Labor Relations Board**, 330 U. S. 485, 492 (1947); **Duplex Printing Press Company v. Deering**, 254 U. S. 443, 474-5 (1921).

That is the precise situation here. We have demonstrated that the language of the Tort Claims Act clearly expressed an intent to make the United States liable to contribution as a joint tortfeasor if a private person would be subject to such liability, and of the right to implead the United States as a third-party defendant to enforce that claim. Even if it were assumed *arguendo* that a statement in a Committee Report indicated a contrary intention, it could not alter the broad language of the Act.

In its brief, the Government devotes many pages to the legislative history of this Act, and prior bills which never became law, in an attempt to show that the Act does not mean what it says. And in doing so, it has had to explain away more than it has been able to adduce in its favor.

Actually, the history of bills providing waiver of the sovereign immunity of the United States from claims on account of personal injury or death contains so many vacillations as to what should and what should not be in the Act that it is not really very helpful at all. Certainly, however, the legislative history does not show an intent to prohibit impleader of the United States as a third-party defendant. On the contrary, careful study of the history in its later stages serves more to support the clear meaning of the words finally enacted than to cast doubt upon them.

In Senate Report No. 1400, 79th Cong., 2nd Sess. (1946), accompanying Senate Bill 2177 (the Legislative Reorganization Act, Section 4 of which contained, except for minor changes not pertinent here, the Federal Tort Claims Act as finally adopted), there is clear evidence of an intent to discard the concept of non-joinder and to treat the United States as a private litigant.

In that Senate Report, it was stated at page 30:

> "Attention is called to the fact that there is now on the House Calendar a bill (HR 181, 79th Cong.)

almost identical with this title. The essential difference is that the House bill puts a maximum limitation of $10,000.00 on claims for which suit may be brought, whereas this title as reported by your committee contains no such limitation. The committee is of the opinion that in view of the banning of private claim bills in the Congress no such limitation should be imposed, **and that with respect to this type of claim the Government should be put in the same position as any private party.**"

The language which we have emphasized confirms the intent to place the Government on a parity with private individuals on all claims not falling within the specific exemptions contained in Section 421. Joinder or impleader necessarily follow. It may be argued that the emphasized language referred only to the reason for dropping the $10,000.00 limit of liability. But if this had been the basis, there would have been no reason to add that language to what was already clear, namely, that since all private claims bills were being banned by the Act, no dollar "limitation should be imposed". And when that language is coupled with a deletion, to which we shall now refer, the absence of any Congressional intent to ban joinder becomes clear.

In House Report No. 1287, 79th Cong., 1st Sess. (1945), accompanying H. R. 181, the statement had been made at page 5:

> "It is intended that the district courts in exercising jurisdiction under this title shall exercise essentially the same type of jurisdiction as district courts exercise concurrently with the Court of Claims of the United States under the Tucker Act (Act of March 3, 1887, 24 Stat. 505; 28 U. S. C. Sec. 41 (20)). The bill therefore does not permit any person to be joined as a defendant with the United States and does not lift the immunity of the United States from tort actions

except as jurisdiction is specifically conferred upon the district courts by this bill. (See *United States v. Sherwood,* 312 U. S. 584 (1941); *Lynn v. United States,* 110 F. (2d) 586, 588 (C. A. A. 5th, 1940); *Waite v. United States,* 57 C. Cls. 546 (1922); *Jackson v. United States,* 27 C. Cls. 74, 84 (1891).) The phrase 'as a court of claims' in section 301 of the Senate bill was deleted as surplusage."[4]

But the above quoted paragraph was deleted in its entirety in Senate Report No. 1400, 79th Cong., 2nd Sess. (1946).

At an apparent loss to explain this deletion, the Government in its brief (Footnote 3, pp. 12-13) dismisses the subject by blandly asserting that this express omission hardly warrants an inference that the view expressed in the House Report had been abandoned by the Senate Committee.

We believe it is apparent that this deletion was deliberate, and not an oversight. In view of the earlier statement on page 30 of the Senate Report,—"and that with respect to this type of claim the Government should be put in the same position as any private party",—the deletion could only confuse unless it was meant to indicate a rejection of the principle of non-joinder. That the deletion was meant not to confuse but rather to demonstrate a Congressional intent becomes clear when it is noted that the substance of all of the paragraphs in House Report No. 1287, which preceded the non-joinder statement there made, were incorporated in Senate Report No. 1400. The Senate Report would hardly have adopted, as it did, all of the statements made in the House Report except that concern-

[4] The limitation was against joinder by a plaintiff of the United States and an individual as co-defendants. Hence, it would not necessarily apply to the present case. Since, however, the government stresses the point, we consider it.

ing non-joinder, unless the non-joinder concept was being discarded.

The court below, having referred to the foregoing, concluded (R. 41):

> "* * * It may be argued with some plausibility, therefore, that the earlier intention of the members of the Judiciary Committee of the House of Representatives to eliminate joinder of the United States was not insisted upon. * * *"

A further indication of Congressional intent is seen in Senate Report No. 1400, 79th Cong., 2nd Sess. (1946). As stated by the court below, (R. 41-42):

> "* * * In referring to the Federal Tort Claims title of S. 2177, S. Rept. 1400 stated that this title was almost identical with that which was incorporated in H. R. 181, with the exception that the $10,000 limitation had been removed. The report said respecting Section 410 of the FTCA, which was the same as Section 301 of H. R. 181: 'The trial will be without a jury as is now the case in suits under the Tucker Act. The liability of the United States will be the same as that of a private person under like circumstance, in accordance with the local law, except that no punitive damages and no interest prior to judgment may be recovered.' **From the foregoing it may be concluded that it was not the intention of Congress to cause the United States to be treated in a different manner from any private litigant in respect to joinder** and that **the feature of the Tucker Act foremost in the mind of Congress was trial to the court without a jury.**"

In the footnote to this statement, the court below, in discussing the argument of the Government bottomed on the inclusion in earlier bills of language providing for pro rata liability of the United States in any case in which it was one of two or more joint tortfeasors, said:

"9. The argument of the United States respecting legislative history may be summed up as follows:

"The Federal Tort Claims Act was included in Title IV Public Law No. 601, enacted by the 2nd Session of the 79th Congress. H. R. 7236, introduced in the 76th Congress 1st Sess., S. 2221 (passed by the Senate) and H. R. 6463 introduced in the 77th Congress 2nd Sess., S. 1114 in the 78th Congress 1st Sess., and H. R. 181 in the 79th Congress are to some degree progenitors of the present Act. Section 403 of H. R. 6463 read as follows: 'If the damage, loss, injury, or death with respect to which a claim is made pursuant to this Act is caused under circumstances creating a legal liability on the part of some person other than an employee of the Government to pay damages therefor, jointly or severally with the United States, the award or judgment against the United States shall be only for the pro rata share of the damages in proportion to the number of parties so jointly or severally liable.' Section 403 of S. 1114 contained substantially the same language. The United States points out that when the FTCA was enacted the language expressly providing for joinder and contribution was omitted. This, it is contended, demonstrates that Congress did not intend that joinder should be made or contribution should be effected.

"We do not find this argument persuasive though, of course, it carries some weight. **We adhere to the view that if Congress had intended to prohibit joinder it would have done so by express mandate in the statute or by unmistakable legislative history in the reports accompanying the legislation as it was enacted.** See the rules for the construction of legislative history as laid down by the Supreme Court of the United States by Mr. Justice Pitney in Duplex Co. v. Deering, 254 U. S. 443, 474-477."

It seems to us that the pro rata liability language appearing in the earlier bills referred to by the court below, and its deletion in the Act as finally adopted, may also be considered as an indication of an ultimate intent to permit joinder. In those earlier bills it was provided that "* * * the Court of Claims and the district courts sitting without a jury, shall have concurrent jurisdiction to hear and determine claims against the United States, not exceeding the sum of * * *". See Hearings before the Committee on the Judiciary, House of Representatives, 77th Cong., 2nd Sess. 1942, on H. R. 5373 and H. R. 6463, p. 2, sec. 301. That language was identical with that in the Tucker Act, Judicial Code, 28 U. S. C. A. section 41 (20), now 28 U. S. C. Section 1346 (a) (2). In view of the doctrine in **United States v. Sherwood**, 312 U. S. 584 (1941), prohibiting joinder of individuals with the United States in claims cognizable under the Tucker Act, it would appear that the pro rata language was necessary in those bills if the Government, when sued alone, was to accomplish in one suit the result about which it complains in the case before this Court.

In any event, whether the pro rata liability language in earlier bills be considered as "expressly providing for joinder", or as we suggest, necessary to produce a pro rata result because joinder was not available, it shows a keen awareness on the part of the draftsmen of the bills of the problems of contribution and joinder. It is reasonable to conclude, therefore, that had Congress intended to deny contribution and to prohibit joinder in the Act it adopted, it would have done so by express mandate in the statute.

In this connection, it is interesting to note that Irvin M. Gottlieb, an attorney for the Claims Division of the Department of Justice, in his Article in the November, 1946 issue of the **Georgetown Law Journal**, p. 36, concluded that:

> "A balancing of the factors evidencing legislative intent, herein set forth, both in favor of and against the joinder of parties hereunder, would seem to favor

the court's permitting joinder in the interest of better administration of justice to all parties concerned."

As we have demonstrated, the legislative history of the Federal Tort Claims Act sustains the view, that even apart from its clear and unambiguous language, joinder of the government as a third party defendant is permissible. However, even if it be conceded that the Committee reports, extending over more than twenty years, are inconclusive, the Government's contention must fall. In view of the broad language in the Act—see **Brooks v. United States**, 337 U. S. 49, 51 (1949); **United States v. Aetna Casualty and Surety Co.**, 338 U. S. 366, 383 (1949),—the reasoning in **Canadian Aviator, Ltd. v. United States**, 324 U. S. 215 (1945) appears clearly applicable.

In the **Canadian Aviator** Case, a shipowner brought suit against the United States contending that liability existed under the provisions of the Public Vessels Act authorizing suits "for damages caused by a public vessel". The complaint alleged that while following directly astern of a public vessel as ordered by naval authorities, complainant's vessel was damaged when it struck a submerged wreck and that the accident resulted solely from the negligence of the public vessel and its crew. The lower court and the Court of Appeals dismissed the suit holding that the phrase in the Act "caused by a public vessel" meant caused by those in charge of the vessel, with the vessel as the "physical" or "noxious" instrument by which the damage was done; that the physical cause was the submerged wreck. Reference was also made to the reports of the Committee which had stated that the "chief purpose of the Act was to authorize recovery in collision cases".

In reversing the Court of Appeals, this Court said, 324 U. S. at 222, 223:

"Respondent contends that § 1 of the Public Vessels Act authorizing suits against the United States

'for damages caused by a public vessel' should be construed to apply only in cases where the public vessel is the 'physical instrument' by which the 'physical damage' is done, e. g. collision; that therefore petitioner's libel does not lie under the Act. Such a construction narrowly limits the Act's relief. We conclude that such a narrow interpretation of the Act is not justifiable. **While the general history of the Act as outlined above does not establish that the statute necessarily extends to the non-collision cases in view of the rule of strict construction of statutory waiver of sovereign immunity,** *United States v. Sherwood,* 312 U. S. 584, 586; *Eastern Transportation Co. v. United States, supra,* we think **Congressional adoption of broad statutory language authorizing suit was deliberate and is not to be thwarted by an unduly restrictive interpretation.** See *The Lake Monroe,* 250 U. S. 246; *Nahmeh v. United States,* 267 U. S. 122, 125-26; *Eastern Transportation Co. v. United States, supra; Federal Land Bank v. Priddy,* 295 U. S. 229, 231."

And at page 225:

> **"The fact that the Committee reports on the bill state that the 'chief purpose' of the Act is to authorize recovery in collision cases, that the departmental letters attached to the report consider principally the 'collision' situation, does not require that the statute should be so limited. * * *"**

In the instant case, the legislative history shows no intent to relieve the United States from liability to contribution to a joint tortfeasor, nor does it show an intent to prohibit joinder. Indeed, if anything, the history shows the contrary. And, in any event, the broad language of the Act is controlling.

II.

THE GOVERNMENT'S FEARS AS TO POSSIBLE PROCEDURAL DIFFICULTIES IN OTHER CASES FURNISH NO BASIS FOR JUDICIAL AMENDMENT OF THE ACT.

The Government endeavors to avoid the liability for contribution imposed by the broad language in the Tort Claims Act by conjuring up conceivable procedural difficulties which may arise in other cases. Even assuming *arguendo* that such other cases might present procedural difficulties, they furnish no justification for judicial amendment of the Act, however much they might justify legislative correction in the future. We pass to a consideration of these procedural "problems", admittedly none of which is present in this case.

A. The Non-Jury Provisions in the Act.

The Government argues that the fact that the Tort Claims Act provides for trial without a jury demonstrates that impleader of the United States by the individual defendant to protect his right to contribution was not contemplated. (Government Brief pp. 6; 16-19.) The Government argues that if the plaintiff or the original defendant were to have demanded a trial by jury, there would be "the incongruous possibility of divergent determinations on identical issues of fact and liability" (p. 17).

A complete answer to this contention was given by the Court below (R. 39):

> "• • • Had a jury been insisted on by the private defendant in the instant case there was no valid reason why the trial judge and the jury respectively should not have determined the liability of the United States and that of the private defendant. Cf. Elkins v. Nobel, (D. C. N. Y.) 1 F. R. D. 357."

That is exactly what was done in **Englehardt v. United States, et al.**, 69 F. Supp. 451 (D. C. Md., 1947),—apparently to the satisfaction of the Government. In a speech at the Missouri Bar District Meeting in St. Louis, Missouri, on February 27, 1948, Judge Collet of the United States Court of Appeals for the Eighth Circuit, pointed out, respecting the **Englehardt** case, 8 F. R. D. 3: "The Government did not appeal this case, but I learned that the individual defendant promptly paid one-half of the judgment."

Moreover, there was no jury complication in the instant case.

B. The Venue Provisions of the Act.

The Government argues that the provision that suit be brought in the district where the plaintiff resides or where the act or omission occurred shows that "joinder of the United States as a third-party defendant may be seen to have been beyond the legislative intent." It is argued that the question whether the Act refers to the residency of the plaintiff or the third-party plaintiff arises, and since it is not answered by the Act, Congress clearly did not have third-party plaintiffs in mind. (Government Brief, pp. 21-22.)

The argument answers itself. It amounts to an assertion that in the face of the broadest kind of language waiving sovereign immunity, recovery should be denied, despite the fact that liability in such cases is clearly contemplated and not included in any of 12 excepted categories, merely because the Act is not drawn to provide in detail for every procedural problem which might arise. No authority is cited for any such proposition, and of course there is none.

The argument was equally applicable to insurance carrier subrogees. And this Court was not persuaded by it in **United States v. Aetna Casualty & Surety Co.**, 338 U. S. 366 (1949).

Actually, no problem arose in this case respecting this question; and none would arise in the overwhelming majority of cases under the Act. If it ever did, the question of construction would then have to be decided.

C. The Permissive Appeal to the Court of Claims Provided in the Act.

The Tort Claims Act provided for review by appeal to the Circuit Courts of Appeals in the same manner as other judgments of the district courts, and then provided in the alternative for appeals to the Court of Claims on condition that "all of the appellees" consent in writing. U. S. Code, 1946 Ed., Title 28, Section 933 (now Section 1504 of revised Title 28, United States Code).

It is argued by the Government that the permissive provision allowing appeals to the Court of Claims shows that Congress intended "to create only the same type of jurisdiction as that existing under the Tucker Act" (Government Brief, 19-21).

The Government's argument amounts to assertion of a rule of statutory construction that would be unique indeed in its operation. It would provide: if in a statute of general application, appeals are permitted to a court of general jurisdiction, and in the alternative, on consent of all parties, to a court of special jurisdiction as well, the statute must be construed as not applying to any case in which appeals are not permissible to the court of special jurisdiction. Here again no authority is cited. We assert with confidence there is no authority for any such far-fetched contention.

The court below conceded that the argument in somewhat different form had weight (R. 40),[5] but this was only

[5] The court below put aside, apparently since the issue was not involved in this case, questions as to the power of Congress to have provided at all for an appeal from an

when the court was preliminarily considering the cases as though the issue were whether the United States and an individual could be joined initially as co-defendants by the plaintiff. When the Court considered the cases in their actual setting, the court said (R. 44):

> "* * * Separate suits could have been filed against the United States by Yellow Cab, the United States being the sole defendant, and judgments of contribution could thus have been obtained by Yellow Cab. The principle of United States v. Sherwood, 312 U. S. 584, 587-8, arising under the Tucker Act, would be inapplicable even by way of analogy for such judgments would have been obtained in suits in which the United States was the sole defendant. In the instant cases the learned trial judge could have terminated the proceedings after judgments had been rendered in favor of the Gutmanns and the Howeys against Yellow Cab, and then could have proceeded to give separate trials to the United States on the issue of contribution. Surely the stricture of the Sherwood case, even if it were deemed to be applicable to cases involving joinder of the United States arising under the FTCA, would not serve to require second, separate trials with the United States as the sole defendant, the issue being one of contribution, for such second, separate trials would embrace the same evidence as that already received and would be conducted before the same judge. Cf. United States v. Aetna Surety Co., *supra*."

Article III court to an Article IV court or to have conferred upon the Court of Claims of the United States in the terms of Section 412 "* * * the same powers and duties [respecting appeals] as those conferred on a * * * court of appeals".

D. The United States Will Not Be Required to Defend the Same Suit Twice if Impleader and Joinder Are Permitted.

The Government argues that if it is liable to contribution it may successfully defend a suit brought by the injured person against it alone, and later be subject to a second suit for contribution after the injured person makes a recovery against the individual tortfeasor. (Government Brief, 40, 41; 52.) That is exactly what may happen in cases of partial subrogees. As Chief Justice Vinson stated in **United States v. Aetna Casualty & Surety Co.**, 338 U. S. 366, 382:

> "It is true that under this rationale, there will be cases in which all parties cannot be joined because one or more are outside the jurisdiction, and the court may nevertheless proceed in the action under Rule 19 (b). In such cases the United States, like other tortfeasors, may have to defend two or more actions on the same tort * * *."

Moreover, this argument of the Government is, we suggest, one of the strongest in favor of joinder or impleader.

In automobile collision cases, which will make up the bulk of litigated claims in which this problem will arise, all of the States and the District of Columbia have statutes providing for service on non-resident motorists. See compilation in C. C. H., Insurance Law Reporter, Sec. 902,001, et seq. Hence, like any private individual, the United States, if sued alone, will be able to implead a non-resident wrongdoer as a third-party defendant except in the rare unusual case.

Similarly, if joinder is permitted, the plaintiff will commence the suit in a district in which he can serve the individual defendant. And even in those cases in which joinder would not be proper because of the lack of diversity

between the plaintiff and the individual defendant, the United States, sued alone, may implead the individual defendant under Rule 14 (a).

Joinder and impleader, therefore, will forestall the possibility of the United States, sued alone initially by the injured person, being required later to defend in a second suit for contribution.

III.

CONTRIBUTION LIKE SUBROGATION RESTS NOT ON CONTRACT BUT ON GENERAL PRINCIPLES OF EQUITY.

In its brief, the Government attempts to distinguish the equity of subrogation from that of contribution, in an effort to convince this Court that its decision in **United States v. Aetna Casualty & Surety Co.**, 338 U. S. 366 (1949), has no application to this case, by analogy or otherwise.

But the right to contribution, like that of subrogation, rests not on contract but on general principles of equity. **Bispham's Principles of Equity**, 10th Ed., Section 338, and cases therein cited; **Southern Surety Co., et al. v. Commercial Casualty Ins. Co., et al.**, 31 F. (2d) 817 (C. A. 3rd, 1929), cert. denied, 280 U. S. 577 (1929); **Aetna Life Ins. Co. v. Middleport**, 124 U. S. 534, 549 (1888); **Prairie State Bank v. United States**, 164 U. S. 227, 231 (1896); **Hoover v. Epler**, 52 Pa. 522, 524 (1866); **Goldman, et al. v. Mitchell-Fletcher Co.**, 292 Pa. 354-357, 358 (1928).

Chancellor Kent, in **Cheesebrough v. Millard**, 1 Johns. Ch. 413 (1815), said that subrogation is a rule "founded in natural justice, and I believe it is recognised in every cultivated system of jurisprudence. * * * It rests on the basis of mere equity and benevolence."

Chancellor Johnson, in **Gadsden v. Brown**, Speer's Eq. (So. Car.) 37, 41 (1843), said that "The doctrine of subrogation is a pure, unmixed equity, having its foundation in

the principles of natural justice." This statement of Chancellor Johnson was cited by this Court in **Aetna Life Ins. Co. v. Middleport**, 124 U. S. 534, 549 (1888), and in **Prairie State Bank v. United States**, 164 U. S. 227, 231 (1896).

In **Southern Surety Co., et al. v. Commercial Casualty Ins. Co.**, 31 F. (2d) 817 (C. A. 3rd, 1929), cert. denied, 280 U. S. 577 (1929), the court, in considering the nature of contribution, said, pp. 818, 819:

> "'The cases are numerous and comparatively uniform that where the parties do not stand in equali jure there can be no contribution. **Equality in bearing a common burden is the principle upon which contribution rests. It does not rest on contract, but on the broad principle that equality is equity**; and where a number of parties stand on the same footing as to liability, one of the number cannot be compelled to assume the whole burden, but may compel his associates to share with him in the loss which he is compelled to pay. Stone v. Fenno, 88 Mass. (6 Allen, 579); Bulkeley v. House, 62 Conn. 459, 26 A. 352, 21 L. R. A. 247; Turk v. Newark Fire Ins. Co. (D. C.) 4 F. (2d) 142; Meigs v. Insurance Co., 205 Pa. 378, 54 A. 1053; King v. Lancaster County Mut. Ins. Co., 45 Pa. Super. Ct. 464; 5 Pom. Eq. Juris, par. 2338, p. 5169."

We submit, therefore, that since contribution and subrogation are both doctrines founded on principles of equity and natural justice, the decision of this Court in **United States v. Aetna Casualty & Surety Co.**, 338 U. S. 366, is of considerable authority in determining the applicability of the Tort Claims Act to contribution cases.

In this portion of our argument, we feel constrained to direct the attention of the Court to certain statements made by the Government which we think do not accurately state the law.

In its brief at page 52, the Government states that "because the subrogee stands in the shoes of the subrogor, a release by the subrogor bars suits by the subrogee". That statement is certainly not accurate.

In the first place, absent statutory provisions to the contrary, the right of subrogation, like that of contribution, does not arise until after payment. **Restatement of the Law of Restitution** Sections 77, 86; **Blashfield, Cyc. of Automobile Law Practice**, Vol. 6, Section 4171, page 416, and Section 4181, page 427. Accordingly, in the type of case to which the Government refers in its brief, if the owner of an automobile covered by a policy of collision insurance releases his right of action against the wrongdoer before settlement with the insurer, that release destroys, by operation of law, his right of action on the policy. **Service Fire Ins. Co. v. Powell**, 70 Ga. App. 213, 27 S. E. 2nd 896 (1943); **Universal Credit Co. v. Service Fire Ins. Co. of New York**, 69 Ga. App. 357, 25 S. E. 2nd 526 (1943); **Auto Owners' Protective Exchange of Kankakee v. Edward**, 82 Ind. App. 558, 136 N. E. 577 (1922); **Farmer v. Union Ins. Co. of Indiana**, 146 Miss. 600, 111 So. 584 (1927); **Maryland Motor Car Ins. Co. v. Haggard**, Civ. App. Tex., 168 S. W. 1011 (1914).

If the release by the subrogor is executed after the carrier has made payment under its policy, the wrongdoer does so at his own risk if he has been put on notice of the interest of the subrogee. **Smith v. Yellow Cab Co.**, 288 Pa. 85 (1927).

In the **Smith** case, an employer had paid to his employe the sums required by the Workmen's Compensation Law. By that law the employer had become subrogated, to the extent of the payments, to the right of the employe against the wrongdoer. Notice of the payments and of the subrogee's interest was served upon the wrongdoer. Thereafter, the wrongdoer took a release in full from the injured employe. In holding that the release by the employe did

not bar suit by the subrogee-employer against the wrongdoer, the court said, 288 Pa., pp. 90, 91:

> "* * * the explicit written notice to defendant, which admittedly was received, was sufficient, under the facts of the instant case, to preserve the employer's right: Fire Assn. of Phila. v. Wells, 84 N. J. Eq. 484; Powell v. Wake Water Co., 171 N. C. 290; Cushman, etc. v. Boston, etc., Ry., 82 Vt. 390; Annotated Cases 1917 A, 1298-1300, note."

It is just incorrect to state, as the Government does, that a release by the subrogor bars suit by the subrogee.

The Government also argues that if it is one of two joint tortfeasors and takes a release from the injured person, that person may subsequently institute suit against the individual tortfeasor and, after successful prosecution of that suit, the individual tortfeasor may later sue the Government for contribution (Government Brief, pp. 40-42; 52). Hence, concludes the Government, "a release from the injured person does not afford the same protection against a suit for contribution" as does a release by the subrogor (Government Brief, p. 52).

We believe we have shown the inaccuracy of the Government's broad assertion that a release by the subrogor bars suit by the subrogee. We shall now demonstrate that the Government's statement as to the effect of a release to a joint tortfeasor is likewise misleading.

In the first place, contribution between joint tortfeasors is not a substantive legal right in all states. In several states contribution between tortfeasors exists only if the injured person secures a joint judgment against the tortfeasors, e. g. Maryland Code (1939) Art. 53, Section 13; New York Civil Practice Act (1941), Section 211a; Texas Revised Statutes (Vernon 1936) Art. 2212. And in most states, including Pennsylvania, a release of one joint

tortfeasor releases all. See Annotation 50 A. L. R. 1058 et seq.

It follows, of course, that where the right to contribution does not exist, or where a joint judgment is a prerequisite, or where a release of one joint tortfeasor releases the others, the Government will never be liable once it has secured a valid release. Moreover, the Government misconceives the meaning of Section 5 of the Uniform Contribution Among Tort Feasors Act, 9 Uniform Laws Annotated 161, and Pocket Part, page 28, and overlooks the provisions of Section 4 of that Act. (The Act has been adopted in Kansas, Maryland, New Mexico, Rhode Island and South Dakota only.)

Section 4 of that Act provides, 9 U. L. A. 164, "A release by the injured person of one joint tortfeasor, whether before or after judgment, does not discharge the other tortfeasors **unless the release so provides;** * * *". Accordingly, even in the five states in question, all the Government has to do to protect itself completely is to provide in the release that the injured person releases not only the Government but the other tortfeasor as well.

Section 5 of that Act, 9 U. L. A. 165,[6] was not placed in the Act as a contradiction of Section 4, but was added out of an abundance of caution on the part of the draftsmen. The Commissioners' Note, Section 5, states 9 U. L. A. 165:

"Although the substance of this Section would probably be recognized anyway by courts allowing con-

[6] "§ 5. *Release; Effect on Right of Contribution.*—A release by the injured person of one joint tortfeasor does not relieve him from liability to make contribution to another joint tortfeasor unless the release is given before the right of the other tortfeasor to secure a money judgment for contribution has accrued, and provides for a reduction, to the extent of the pro rata share of the released tortfeasor, of the injured person's damages recoverable against all the other tortfeasors."

tribution among tortfeasors under the previous sections of this Act, it seems advisable nevertheless to include it. Under it, an injured person, acting in collusion with or out of sympathy for one of the tortfeasors, cannot relieve him from the obligation to contribute to the other tortfeasors by releasing him. The only way in which such a release can free the released tortfeasor from his duty to contribute is to include a provision to the effect that the other tortfeasors shall be released from the injured person's pro rata share of the common liability."[7]

A valid release from an injured person affords the same protection against a suit for contribution as a release by the subrogor against a suit by the subrogee.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the judgments below should be affirmed.

Respectfully submitted,

WM. A. SCHNADER,
BERNARD G. SEGAL,
JAMES J. LEYDEN,
Attorneys for Respondent.

SCHNADER, HARRISON, SEGAL & LEWIS,
1719 Packard Building,
Philadelphia 2, Pa.,
Of Counsel.

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[7] This Act has not been adopted in Pennsylvania and therefore the discussion is not pertinent to the instant cases in any event. We comment upon the Government's misinterpretation of the Act only because we are replying to each of the Government's contentions, whether or not we consider them relevant or applicable.

APPENDIX.

The Federal Tort Claims Act of 1946, 60 Stat. 842, U. S. Code, 1946 Ed., Title 28, reads as follows:

CHAPTER 20.—FEDERAL TORT CLAIMS.

SUBCHAPTER I. ADMINISTRATIVE ADJUSTMENT OF TORT CLAIMS AGAINST THE UNITED STATES.

Sec.
921. Settlement of claims of $1,000 or less; conclusiveness; appropriations.
922. Reports to Congress.

SUBCHAPTER II. SUITS ON TORT CLAIMS AGAINST THE UNITED STATES.

931. Jurisdiction; liability of United States; judgment; election by claimant; amount of suit; administrative disposition as evidence.
932. Procedure.
933. Review.
934. Compromise and settlement of suits.

SUBCHAPTER III. MISCELLANEOUS PROVISIONS.

941. Definitions.
942. Statute of limitations.
943. Claims exempted from operation of chapter.
944. Attorney's fees; penalties.
945. Exclusiveness of chapter.
946. Laws unaffected.

SUBCHAPTER I. ADMINISTRATIVE ADJUSTMENT OF TORT CLAIMS AGAINST THE UNITED STATES.

§ 921. *Settlement of claims of $1,000 or less; conclusiveness; appropriations.*

(a) Subject to the limitations of this chapter, authority is conferred upon the head of each Federal agency, or his designee for the purpose, acting on behalf of the United States, to consider, ascertain, adjust, determine, and settle any claim against the United States for money only, accruing on and after January 1, 1945, on account of damage to or loss of property or on account of personal injury or death, where the total amount of the claim does not exceed $1,000, caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death, in accordance with the law of the place where the act or omission occurred.

(b) Subject to the provisions of subchapter II of this chapter, any such award or determination shall be final and conclusive on all officers of the Government, except when procured by means of fraud, notwithstanding any other provision of law to the contrary.

(c) Any award made to any claimant pursuant to this section, and any award, compromise, or settlement of any claim cognizable under this chapter made by the Attorney General pursuant to section 934 of this title, shall be paid by the head of the Federal agency concerned out of appropriations that may be made therefore, which appropriations are hereby authorized.

(d) The acceptance by the claimant of any such award, compromise, or settlement shall be final and conclusive on

the claimant, and shall constitute a complete release by the claimant of any claim against the United States and against the employee of the Government whose act or omission gave rise to the claim, by reason of the same subject matter. (Aug. 2, 1946, ch. 753, title IV, § 403, 60 Stat. 843.)

CODIFICATION.

Chapter was not enacted as a part of the Judicial Code.

SHORT TITLE.

Congress in enacting this chapter provided by section 401 of act Aug. 2, 1946, cited to text, that it should be popularly known as the "Federal Tort Claims Act".

REPEALS.

Section 424 (a) of act Aug. 2, 1946, cited to text, provided in part that: "All provisions of law authorizing any Federal agency to consider, ascertain, adjust, or determine claims on account of damage to or loss of property, or on account of personal injury or death, caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, are hereby repealed in respect of claims cognizable under part 2 of this title [subchapter I of this chapter] and accruing on and after January 1, 1945."

§ 922. *Reports to Congress.*

The head of each Federal agency shall annually make a report to the Congress of all claims paid by such Federal agency under this subchapter. Such report shall include the name of each claimant, a statement of the amount claimed and the amount awarded, and a brief description of the claim. (Aug. 2, 1946, ch. 753, title IV, § 404, 60 Stat. 843.)

SUBCHAPTER II. SUITS ON TORT CLAIMS AGAINST THE UNITED STATES.

§ 931. *Jurisdiction; liability of United States; judgment; election by claimant; amount of suit; administrative disposition as evidence.*

(a) Subject to the provisions of this chapter, the United States district court for the district wherein the plaintiff is resident or wherein the act or omission complained of occurred, including the United States district courts for the Territories and possessions of the United States, sitting without a jury, shall have exclusive jurisdiction to hear, determine, and render judgment on any claim against the United States, for money only, accruing on and after January 1, 1945, on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death in accordance with the law of the place where the act or omission occurred. Subject to the provisions of this chapter, the United States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances, except that the United States shall not be liable for interest prior to judgment, or for punitive damages. Costs shall be allowed in all courts to the successful claimant to the same extent as if the United States were a private litigant, except that such costs shall not include attorneys' fees.

(b) The judgment in such an action shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the Government whose act or omission gave rise to the claim. No suit shall be instituted pursuant to this section upon a

claim presented to any Federal agency pursuant to subchapter I of this chapter unless such Federal agency has made final disposition of the claim: *Provided*, That the claimant may, upon fifteen days' notice given in writing, withdraw the claim from consideration of the Federal agency and commence suit thereon pursuant to this section: *Provided further*, That as to any claim so disposed of or so withdrawn, no suit shall be instituted pursuant to this section for any sum in excess of the amount of the claim presented to the Federal agency, except where the increased amount of the claim is shown to be based upon newly discovered evidence not reasonably discoverable at the time of presentation of the claim to the Federal agency or upon evidence of intervening facts, relating to the amount of the claim. Disposition of any claim made pursuant to said subchapter shall not be competent evidence of liability or amount of damages in proceedings on such claim pursuant to this section. (Aug. 2, 1946, ch. 753, title IV, § 410, 60 Stat. 843.)

§ 932. *Procedure.*

In actions under this subchapter, the forms of process, writs, pleadings, and motions, and the practice and procedure, shall be in accordance with the rules promulgated by the Supreme Court pursuant to sections 723b and 723c of this title; and the same provisions for counterclaim and set-off, for interest upon judgments, and for payment of judgments, shall be applicable as in cases brought in the United States district courts under sections 41 (20), 250 (1), (2), 251, 254, 257, 258, 287, 289, 292, 761-765 of this title. (Aug. 2, 1946, ch. 753, title IV, § 411, 60 Stat. 844.)

§ 933. *Review.*

(a) Final judgments in the district courts in cases under this subchapter shall be subject to review by appeal—

(1) in the circuit courts of appeals in the same manner and to the same extent as other judgments of the district courts; or

(2) in the Court of Claims of the United States; *Provided*, That the notice of appeal filed in the district court under rule 73 of the Rules of Civil Procedure following section 723c of this title shall have affixed thereto the written consent on behalf of all the appellees that the appeal be taken to the Court of Claims of the United States. Such appeals to the Court of Claims of the United States shall be taken within three months after the entry of the judgment of the district court, and shall be governed by the rules relating to appeals from a district court to a circuit court of appeals adopted by the Supreme Court pursuant to sections 723b and 723c of this title. In such appeals the Court of Claims of the United States shall have the same powers and duties as those conferred on a circuit court of appeals in respect to appeals under section 226 of this title.

(b) Sections 346 and 347 of this title, shall apply to cases under this part in the circuit courts of appeals and in the Court of Claims of the United States to the same extent as to cases in a circuit court of appeals therein referred to. (Aug. 2, 1946, ch. 753, title IV, § 412, 60 Stat. 844.)

§ 934. *Compromise and settlement of suits.*

With a view to doing substantial justice, the Attorney General is authorized to arbitrate, compromise, or settle any claim cognizable under this subchapter, after the institution of any suit thereon, with the approval of the court in which such suit is pending. (Aug. 2, 1946, ch. 753, title IV, § 413, 60 Stat. 845.)

SUBCHAPTER III. MISCELLANEOUS PROVISIONS.

§ 941. *Definitions.*

As used in this chapter, the term—

(a) "Federal agency" includes the executive departments and independent establishments of the United States, and corporations whose primary function is to act as, and while acting as, instrumentalities or agencies of the United

States, whether or not authorized to sue and be sued in their own names: *Provided*, That this shall not be construed to include any contractor with the United States.

(b) "Employee of the Government" includes officers or employees of any Federal agency, members of the military or naval forces of the United States, the persons acting on behalf of a Federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

(c) "Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States, means acting in line of duty. (Aug. 2, 1946, ch. 753, title IV, § 402, 60 Stat. 842.)

§ 942. *Statute of limitations.*

Every claim against the United States cognizable under this chapter shall be forever barred, unless within one year after such claim accrued or within one year after August 2, 1946, whichever is later, it is presented in writing to the Federal agency out of whose activities it arises, if such claim is for a sum not exceeding $1,000; or unless within one year after such claim accrued or within one year after August 2, 1946, whichever is later, an action is begun pursuant to subchapter II of this chapter. In the event that a claim for a sum not exceeding $1,000 is presented to a Federal agency as aforesaid, the time to institute a suit pursuant to subchapter II of this chapter shall be extended for a period of six months from the date of mailing of notice to the claimant by such Federal agency as to the final disposition of the claim or from the date of withdrawal of the claim from such Federal agency pursuant to section 931 of this title, if it would otherwise expire before the end of such period. (Aug. 2, 1946, ch. 753, title IV, § 420, 60 Stat. 845.)

§ 943. *Claims exempted from operation of chapter.*

The provisions of this chapter shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by sections 741-752, or 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-38 of Appendix to Title 50.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) Any claim arising from injury to vessels, or to the cargo, crew, or passengers of vessels, while passing through the locks of the Panama Canal or while in Canal Zone waters.

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority. (Aug. 3, 1946, ch. 753, title IV, § 421, 60 Stat. 845.)

§ 944. *Attorney's fees; penalties.*

The court rendering a judgment for the plaintiff pursuant to subchapter II of this chapter, or the head of the Federal agency or his designee making an award pursuant to subchapter I of this chapter, or the Attorney General making a disposition pursuant to section 934 of this title, as the case may be, may, as a part of the judgment, award, or settlement, determine and allow reasonable attorney's fees, which, if the recovery is $500 or more, shall not exceed 10 per centum of the amount recovered under subchapter I of this chapter, or 20 per centum of the amount recovered under subchapter II of this chapter, to be paid out of but not in addition to the amount of judgment, award, or settlement recovered, to the attorneys representing the claimant. Any attorney who charges, demands, receives, or collects for services rendered in connection with such claim any amount in excess of that allowed under this section, if recovery be had, shall be guilty of a misdemeanor, and shall, upon conviction thereof, be subject to a fine of not more than $2,000 or imprisonment for not more than one year, or both. (Aug. 2, 1946, ch. 753, title IV, § 422, 60 Stat. 846.)

§ 945. *Exclusiveness of chapter.*

From and after August 2, 1946, the authority of any Federal agency to sue and be sued in its own name shall not be construed to authorize suits against such Federal agency on claims which are cognizable under subchapter II of this chapter, and the remedies provided by this chapter in such cases shall be exclusive. (Aug. 2, 1946, ch. 753, title IV, § 423, 60 Stat. 846.)

§ 946. *Laws unaffected.*

Nothing contained in this chapter shall be deemed to repeal any provision of law authorizing any Federal agency to consider, ascertain, adjust, settle, determine, or pay any claim on account of damage to or loss of property or on account of personal injury or death, in cases in which such damage, loss, injury, or death was not caused by any negligent or wrongful act or omission of an employee of the Government while acting within the scope of his office or employment, or any other claim not cognizable under subchapter I of this chapter. (Aug. 2, 1946, ch. 753, title IV, § 424 (b), 60 Stat. 847.)

CODIFICATION.

Section comprised subsec. (b) of section 424 of act Aug. 2, 1946, cited to text. Subsec. (a) of said section is set out as a note under section 921 of this title.

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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1950

No. 204

CAPITAL TRANSIT COMPANY, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED JULY 18, 1950.

CERTIORARI GRANTED OCTOBER 9, 1950.

SUPREME COURT OF THE UNITED STATES

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[fol. 1] **IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 10467

CAPITAL TRANSIT COMPANY, a Corporation, Appellant,

v.

UNITED STATES, Appellee

JOINT APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2521-49

KENNETH NEIL STRADLEY, 1641 35th Street, N. W., Washington, D. C., Plaintiff,

v.

CAPITAL TRANSIT COMPANY, INC., a Corporation, 36th & M Streets, N. W., Washington, D. C., Defendant

COMPLAINT—FOR NEGLIGENCE—Filed June 9, 1949

(Damages for personal injuries to passenger on streetcar, collision between streetcar and automobile)

1. This Court has jurisdiction of this case because it involves a suit for personal injuries wherein the claim is in excess of $3,000.00.

2. That on or about August 4, 1947, at about 11:55 P. M., at or near 7th Street and Constitution Avenue, N. W., in the City of Washington, District of Columbia, a streetcar owned, maintained, controlled and operated by the defendant, Capital Transit Company, Inc., a corporation, acting by and through its agent, servant and employee, came into collision with a motor vehicle (jeep) operated by Manuel Bridgeman, of Ft. Myer, Virginia, said collision being caused by the negligent, careless and unlawful manner in which said defendant's streetcar was being controlled and operated by and through its agent, servant and employee, and in violation by said defendant, acting by and through its agent, servant and employee, of the Traffic Regulations,

then and there in full force and effect in said District. That [fol. 2] said streetcar provided by the defendant for the use of its passengers, including the plaintiff passenger, was in the sole control and dominion of said defendant.

3. That as a result of the aforesaid collision, and the defendant's aforesaid negligence, the plaintiff, a passenger in the streetcar owned, maintained, controlled and operated by the said defendant, acting by and through its agent, servant and employee, sustained severe and permanent injuries, and the plaintiff suffered and will continue to suffer great physical and mental pain and anguish and his nervous system was and will be, in the future, shocked and impaired, and permanently injured; and the plaintiff sustained severe and marked aggravation of certain preexisting disabilities and injuries, by reason thereof; that said injuries interfered, and will, in the future, interfere with plaintiff's preexisting abnormal gait and by reason thereof the plaintiff suffered and will continue to suffer great physical pain and difficulty in walking and moving about in the pursuit of his employment and personal affairs, and that plaintiff walks with great pain and difficulty, and the plaintiff was otherwise injured; that the plaintiff was unable to pursue his employment with consequent past and future loss of earnings; that plaintiff has incurred, and will in the future incur, large expense for medical and surgical treatment, hospitalization, medicines and X-rays, spinal operation to be performed involving the transplantation of a bone-graft which must be planted into plaintiff's lumbar spine, and for other purposes in his endeavor to be healed and cured of his injuries, that when said spine operation is performed, said plaintiff will be incapacitated for a long period of time with consequent heavy future loss of earnings and expense, and the plaintiff was otherwise damaged; all to the plaintiff's damage in the sum of Fifty-Thousand ($50,000.00) Dollars.

[fol. 3] Wherefore, the plaintiff demands judgment against the defendant in the sum of Fifty Thousand ($50,000.00) Dollars besides the costs of this action.

Lester Wood, 821 15th Street, N. W., Washington 5, D. C., Attorney for Plaintiff.

DEMAND FOR JURY TRIAL

The plaintiff demands a trial by jury in the above entitled cause under the provisions of Rule 38(b) of the Rules of Civil Procedure for the District Courts of the United States.

Lester Wood, Attorney for Plaintiff.

IN UNITED STATES DISTRICT COURT

MOTION FOR LEAVE TO BRING IN THIRD PARTY DEFENDANT—Filed June 27, 1949

Defendant, Capital Transit Company, before answering, moves ex parte for leave to make the United States of America a party to this action and that there be served upon it the summons and third-party complaint as set forth in Exhibit A attached hereto.

Hogan & Hartson, By George D. Horning, Jr., Frank F. Roberson, Attorneys for Defendant, 810 Colorado Building, Washington 5, D. C.

[fol. 4] EXHIBIT "A" TO MOTION

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2521-49

KENNETH NEIL STRADLEY, 1641 35th Street, N. W., Washington, D. C., Plaintiff,

v.

CAPITAL TRANSIT COMPANY, a Corporation, 36th and M Streets, N. W., Washington, D. C., Defendant and Third-Party Plaintiff

v.

UNITED STATES OF AMERICA, c/o The Attorney General, Washington, D. C., Third-Party Defendant

THIRD-PARTY COMPLAINT

1. The plaintiff, Kenneth Neil Stradley, has filed against defendant, Capital Transit Company, a complaint, copy of which is attached hereto as Exhibit 1.

2. At the time and place of the collision referred to in plaintiff's complaint, the plaintiff was a passenger in the defendant, Capital Transit Company's streetcar which came into collision with an United States Army ¼ ton truck. Said truck was owned by the third-party defendant, United States of America, and was being operated by a soldier in the course of his employment, to wit, Manuel Bridgeman of Fort Myer, Virginia. The sole or contributing cause of said [fol. 5] collision was negligent operation of the third-party defendant's vehicle which was being driven carelessly and in violation of the motor vehicle and traffic regulations then in force and effect.

3. Any injuries which plaintiff suffered were due solely or in part to the negligence of the third-party defendant, United States of America.

Wherefore, defendant, Capital Transit Company, demands judgment against the third-party defendant for a contributable portion of any sum which may be adjudged against the Capital Transit Company in favor of the plaintiff, Kenneth Neil Stradley.

Hogan & Hartson, by George D. Horning, Jr., Frank F. Roberson, Attorneys for Defendant and Third-Party Plaintiff, Capital Transit Company, 810 Colorado Building, Washington 5, D. C.

* * * * * * * *

IN UNITED STATES DISTRICT COURT

ORDER—Filed June 27, 1949

This cause came on to be heard upon motion of the defendant for leave as third-party plaintiff to serve a summons and complaint upon the United States of America, and upon consideration thereof it is by the Court this 27th day of June, 1949,

Ordered, that the motion be and the same hereby is granted and the defendant is hereby given leave, as a third-party plaintiff, to serve a summons and complaint upon the United State of America.

Matthew F. McGuire, Judge.

* * * * * * * *

[fol. 6] IN UNITED STATES DISTRICT COURT

ANSWER OF CAPITAL TRANSIT COMPANY TO COMPLAINT—Filed June 29, 1949

The defendant, Capital Transit Company, admits that on or about August 4, 1947, in the intersection of Seventh Street and Constitution Avenue, Northwest, Washington, District of Columbia, one of its streetcars, on which the plaintiff was a passenger, was struck by an United States Army ¼ ton truck. Said truck was owned by the third-party defendant, United States of America, and was being operated in the course of his employment by a soldier, to wit, Manuel Bridgeman of Fort Myer, Virginia. Defendant, Capital Transit Company, avers that the cause of said collision was negligent operation of the third-party defendant's vehicle, which was being driven carelessly, negligently and in violation of the motor vehicle and traffic regulations then and there in force and effect. The defendant is without knowledge or information sufficient to form a belief as to the injuries and damage allegedly suffered by the plaintiff. The defendant, Capital Transit Company, denies the remaining allegations of the complaint.

Hogan & Hartson, by George D. Horning, Jr., Frank F. Roberson, Attorneys for Defendant, 810 Colorado Building, Washington 5, D. C.

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IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS THIRD-PARTY COMPLAINT—Filed August 18, 1949

Comes now the United States and by its attorney, the United States Attorney and moves this court to dismiss the [fol. 7] third-party complaint filed herein for the reason that it fails to state a cause of action upon which relief may be granted.

George Morris Fay, United States Attorney; Ross O'Donoghue, Assistant United States Attorney.

* * * * * * *

IN UNITED STATES DISTRICT COURT

OPINION.—Filed October 26, 1949

This case presents the question whether the United States may be made a third-party defendant for the purpose of contribution under the Federal Tort Claims Act, now incorporated in Title 28, United States Code.

Plaintiff instituted an action against the Capital Transit Co., Inc., alleging that he was a passenger on one of its street cars which collided with a "vehicle," and that the collision was caused by the negligence of defendant's employee. Defendant moved for leave to make the United States a party to the action. The motion was granted, and a third-party complaint was filed, alleging that the street car came into collision with a United States Army truck operated by a soldier in the course of his employment, and that the sole or contributing cause of the collision was the negligent operation of the truck, and demanding judgment for contribution. The United States has moved to dismiss the third-party complaint on the ground that it fails to state a cause of action upon which relief may be granted.

Section 1346 (b), Title 28 U. S. C., gives the District Courts "exclusive jurisdiction of civil actions on claims against the United States, for money damages, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or em-
[fol. 8] ployment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." Section 2674, Title 28 U. S. C., provides that "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances. . . ."

Over fifty years ago, in Schillinger v. United States, 155 U. S. 163, 39 L. Ed. 108, 110, the Supreme Court had under consideration a case involving the jurisdiction of the Court of Claims, and in the first paragraph of its opinion, made the following pertinent observation: "The United States cannot be sued in their courts without their consent, and in granting such consent Congress has an absolute discretion to specify the cases and contingencies in which the liability of the Government is submitted to the courts for judicial

determination. Beyond the letter of such consent, the courts may not go, no matter how beneficial they may deem or in fact might be their possession of a larger jurisdiction over the liabilities of the government." This view was reiterated in 1927 in Eastern Transportation Co. v. United States, 272 U. S. 675, 686, in the following language: "The sovereignty of the United States raises a presumption against its suability, unless it is clearly shown; nor should a court enlarge its liability to suit beyond what the language requires." Again in 1931, in United States v. Michel, 282 U. S. 656, in construing an Act permitting suits against the United States to recover Internal Revenue taxes, the Court held that it was "well established that suit may not be maintained against the United States in any case not clearly within the terms of the statute by which it consents to be sued." Expressions of the Supreme Court to the same effect may be multiplied,[1] and they are controlling upon me. [fol. 9] Applying this rule of construction to the present case, I find nothing within the letter of the statute constituting a waiver of immunity in respect of claims against the United States for contribution in actions in tort. Such a claim is not one for "money damages for . . . personal injury or death," which is the language of the statute. It is a claim, equitable in character, for payment of a proportionate part of the claimant's liability for damages to a third person. As stated by Chief Justice Groner in George's Radio, Inc. v. Capital Transit Co., 75 U. S. App. D. C. 187, 189, the reason for that court's change of view allowing contribution "in the main hinges on the doctrine that general principles of justice require that in the case of a common obligation, the discharge of it by one of the obligers without proportionate payment from the other, gives the latter an advantage to which he is not equitably entitled." Or, as set forth by Judge Bryan, in Drummond v. United States (E. D., Va.) 78 Fed. Supp. 730, contribution, except in admiralty, "is not part of the original claim or tort," but is "an adjustment between defendants independent and separate from the plaintiff's claim, and rooting from principles of equity, not from the principles of tort-liability." Support for the view herein expressed is also found in those

[1] E. g. Klamath Indians v. United States, 296 U. S. 244, 250 (1935); United States v. Shaw, 309 U. S. 495, 502 (1940); United States v. Sherwood, 312 U. S. 584, 590 (1941).

cases holding that the United States may not be joined with another as a party defendant in an action under the statute here involved.[2] True it is, there is diversity of opinion among the Federal District Courts, on the question of joinder of the United States as a codefendant,[3] but none of those cases upholding such jurisdiction has expressly sanctioned the impleading of the United States as a third-party defendant solely for contribution. I am of opinion that it cannot be done under present statutory restrictions, [fol. 10] and accordingly the motion to dismiss will be granted.

Counsel will submit order in accordance herewith.

David A. Pine, Judge.

October 26, 1949.

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In United States District Court

Order Granting Third-Party Defendant's Motion to Dismiss Third-Party Complaint—Filed November 2, 1949

The above cause having come on for hearing before the Court upon motion by the United States of America, Third-party defendant, to dismiss the Third-party complaint filed against it by the Third-party plaintiff, Capital Transit Company; the Court having considered the motion and the points and authorities filed in support thereof and in opposition thereto; the Court having considered the arguments of counsel; and the Court having filed a memorandum opinion in

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[2] Sappington v. Prencipe, U. S. District Court for D. C. (1948) C. A. 37213; Uarte v. United States, D. C. Cal. 1948, 7 FRD 705; Drummond v. United States, D. C. Va. 1948, 78 F. Supp. 730; Donovan v. McKenna, D. C. Mass. 1948, 80 F. Supp. 690.

[3] Englehardt v. United States, D. C. Md. 1947, 69 F. Supp. 451; Dickens v. Jackson, D. C., E. D., N. Y. 1947, 71 F. Supp. 753; Bullock v. United States, D. C. N. J. 1947, 72 F. Supp. 445.

respect of this motion on October 26, 1949; it is by the Court, this 2d day of November, 1949, hereby:

Ordered, Adjudged, and Decreed that the motion to dismiss the Third-party complaint be and the same hereby is granted.

David A. Pine, District Judge.

Submitted by Stafford R. Grady, Assistant United States Attorney, Attorney for Third-party Defendant.

No objection as to Form: Hogan & Hartson, by Frank F. Roberson, Attorney for Defendant and Third-party Plaintiff.

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[fol. 11] IN UNITED STATES DISTRICT COURT

MOTION FOR FINAL JUDGMENT ON THE THIRD-PARTY COMPLAINT—Filed November 2, 1949

Comes now the United States of America, Third-party defendant, and moves the Court under Rule 54(b) of the Federal Rules of Civil Procedure to enter a final judgment disposing of the Third-party complaint for contribution of the Capital Transit Company, Third-party plaintiff. The ground for this motion is that there is no just reason for delay in the entry of such a judgment.

Respectfully submitted, George Morris Fay, United States Attorney. Ross O'Donoghue, Assistant United States Attorney. Stafford R. Grady, Assistant United States Attorney, Attorneys for Third-party defendant.

Consent: Hogan & Hartson, by Frank F. Roberson, Attorney for defendant and third-party plaintiff.

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IN UNITED STATES DISTRICT COURT

FINAL JUDGMENT DISMISSING THIRD-PARTY COMPLAINT—Filed November 2, 1949

This action having come on for hearing before the Court upon motion by the United States of America, Third-party defendant, pursuant to Rule 54(b) of the Federal Rules of

Civil Procedure, for the entry of a final judgment disposing [fol. 12] of the Third-party complaint for contribution, counsel for Third-party plaintiff having indicated on the motion and having stated in open court that it consents to the entry of a final judgment at this time and the court being of the opinion that there is no just reason for delay, it is by the Court this 2d day of November, 1949, hereby:

Ordered, Adjudged, and Decreed that the motion for final judgment dismissing the Third-party complaint, is granted and the Clerk of the Court is hereby directed to enter the Third-party complaint filed by the Capital Transit Company against the United States of America, as dismissed with prejudice.

David A. Pine, District Judge.

Submitted by: Stafford R. Grady, Assistant United States Attorney, Attorney for Third-party Defendant.

No Objection As to Form: Hogan & Hartson, by Frank F. Roberson, Attorney for Defendant and Third-party Plaintiff.

* * * * * * *

In United States District Court

Notice of Appeal—Filed November 2, 1949

Notice is hereby given this 2nd day of November, 1949, that Capital Transit Company, defendant and third-party plaintiff, hereby appeals to the United States Court of Appeals for the District of Columbia Circuit from the final judgment of this Court entered on the 2nd day of November, 1949 in favor of the United States of America, [fols. 13-17] third-party defendant against said Capital Transit Company, third-party plaintiff.

Hogan & Hartson, by George D. Horning, Jr., Frank F. Roberson, Attorneys for defendant and Third-party plaintiff, Capital Transit Co., 810 Colorado Bldg.

[fol. 18] Wednesday, March 29, 1950.

* * * * * * *

No. 10467, January Term, 1950

CAPITAL TRANSIT COMPANY, Appellant,

v.

UNITED STATES OF AMERICA, Appellee

Before Honorable Bennett Champ Clark, George T. Washington, Circuit Judges, and Kimbrough Stone, Circuit Judge, sitting by designation.

On motion of Mr. Joseph M. Howard, Mr. Marvin Frankel of the Bar of the Court of Appeals of New York was permitted to argue for appellee pro hac vice by special leave of Court.

Argument in the above-entitled case was commenced by Mr. Frank F. Roberson for appellant, and concluded by Mr. Marvin Frankel, for appellee.

* * * * * * * *

[fol. 19] [Stamp:] United States Court of Appeals for the District of Columbia Circuit. Filed May 16, 1950. Joseph W. Stewart, Clerk

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10467

CAPITAL TRANSIT COMPANY, a Corporation, Appellant,

v.

UNITED STATES, Appellee

Appellant's Motion for Leave to File Copies of Subsequent Opinion

Comes now the appellant and moves the court for leave to file herein copies of the opinion of the United States Court of Appeals for the Third Circuit in the case of *Howey* v. *Yellow Cab Co.*, decided April 27, 1950. From the ex-

cerpts printed in 18 U.S.L. Week 2495-6 (issue of May 2, 1950), that case appears to be directly in point in support of appellant's contention in the present case that the Federal Tort Claim Act permits the United States to be brought in as a third-party defendant on a claim for contribution.

Respectfully submitted, George D. Horning, Jr., Frank F. Roberson, Attorneys for Appellant.

A copy of the foregoing motion was mailed this 16th day of May, 1950, to H. G. Morison Esq. attorney for appellee United States, Department of Justice, Washington, D. C.

Frank F. Roberson.

[fol. 20] [Stamp:] United States Court of Appeals for the District of Columbia Circuit. Filed Jun. 1, 1950. Joseph W. Stewart, Clerk

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, APRIL TERM, 1950

No. 10467

CAPITAL TRANSIT COMPANY, a Corporation, Appellant,

v.

UNITED STATES OF AMERICA, Appellee

Before: Clark, Washington and Kimbrough Stone *, Circuit Judges

Order

Upon consideration of appellant's motion for leave to file copies of the opinion of the United States Court of Appeals for the Third Circuit in cases Nos. 9966 and 9967, Howey et al. v. Yellow Cab Company v. United States of America, for the use of this Court in the above entitled case, and it appearing that copies of said opinion have been lodged with this Court, It is

Ordered that the motion be granted, and that the Clerk be, and he is hereby, directed to file said opinions forthwith.

Per Curiam.

Dated June 1, 1950.

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* Circuit Judge sitting by designation.

[fol. 21] [Stamp:] United States Court of Appeals for the District of Columbia Circuit. Filed Jun. 1, 1950. Joseph W. Stewart, Clerk.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 9966

CALVIN HOWEY AND JUSTINE A. HOWEY

v.

YELLOW CAB COMPANY

v.

UNITED STATES OF AMERICA, Third-Party Defendant-Appellant

No. 9967

ROSE M. GUTMANN AND ROBERT HENRY GUTMANN

v.

YELLOW CAB COMPANY

v.

UNITED STATES OF AMERICA, Third-Party Defendant Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued December 6, 1949

Before BIGGS, *Chief Judge*, and O'CONNELL and KALODNER, *Circuit Judges*.

OPINION OF THE COURT—Filed April 27, 1950

By BIGGS, *Chief Judge*.

There are two appeals at bar. They can be disposed of appropriately in one opinion. Two suits were brought in the court below because the Gutmanns and the Howeys, the original plaintiffs, riding together as passengers, were [fol. 22] injured in a collision which took place in Philadelphia on December 1, 1946 between a taxicab operated

by Yellow Cab Company, the original defendant and the third-party plaintiff, and a mail truck operated by an employee of the United States, the third-party defendant.

The Gutmanns and the Howeys sued Yellow Cab Company in the two suits referred to, jurisdiction being based on diversity and requisite amount. Thereafter, Yellow Cab filed a third-party complaint in each suit seeking to enforce contribution from the United States.[1] See Rule 14 (a), FRCP.

The United States, as third-party defendant, filed a motion to dismiss each suit on the ground that the Federal Tort Claims Act[2] "does not authorize the maintenance of suits upon derivative claims." These motions were denied and the United States then filed answers. The cases were consolidated for trial and evidence was presented by the plaintiffs, the original defendant and by the third-party defendant. The court below found Yellow Cab Company and the United States both guilty of negligence,[3] gave judgments against Yellow Cab in favor of the Gutmanns in the amount of $5,800, in favor of the Howeys in the sum of $2,000, and ordered one-half of the respective amounts to be paid by the United States by way of contribution. The United States then moved to set aside the verdicts on the same ground theretofore asserted, viz., that the FTCA did not authorize "derivative" suits against the United States. The District Court decided that the third-party actions could be maintained[4] and overruled the motions. The United States has appealed.

The United States in its briefs and argument in this court has treated the questions involved as if they were [fol. 23] those only of joinder, i. e., as if the issue were:

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[1] In the third-party complaints Yellow Cab demands judgment against the United States "for all sums that may be adjudged against defendant, Yellow Cab Company, in favor of plaintiffs . . .".

[2] 28 U. S. C. (1946 ed.) Sections 921-946. Most of the provisions of what was the FTCA are now sown throughout revised Title 28. See "Table 1", an addendum to revised Title 28, United States Code, "Judiciary and Judicial Procedure", 28 U. S. C. A., as appears.

[3] The opinion was not reported for publication.

[4] The opinion was not reported for publication.

Does the FTCA permit the United States to be joined with Yellow Cab Company as a party defendant? In the court below, however, at least by way of pleading, emphasis seems to have been laid by the United States on the question as to whether actions for contribution, such as those asserted here against the United States, can be maintained under the applicable Pennsylvania statute, 12 P. S. Pa. § 2081. We will discuss the cases in the first instance as if the primary issue were one of joinder and then endeavor to dispose of the questions presented by the pending actions treating them as, what they in reality are, suits for contribution.

The primary question on the joinder phase of the appeals can be phrased as follows: Did the FTCA authorize joinder of the United States with another party defendant or did the Act only authorize suits brought against the United States as the sole or single defendant? Carefully balancing the language of the statute some courts have held that the United States may be joined with another defendant or defendants. See for example Englehardt v. United States (D. C. Md.) 69 F. Supp. 451. Subrogation against the United States also has been permitted. See United States v. Aetna Surety Co., 338 U. S. 366, referred to hereinafter, and the pertinent cases cited therein. Other courts have taken the view that the FTCA authorized suits against the United States only when it was the sole defendant, basing their conclusions in large part on legislative history. See Drummond v. United States (D. C. Va.) 78 F. Supp. 730 and Uarte v. United States (D. C. Cal.) 7 F. R. D. 705.[5]

At the time of the occurrence of the accident the provisions of revised Title 28, United States Code, were not in effect, the effective date of revised title being September 1, 1948. See Section 38 of the Act of June 25, 1948, c. 646, [fol. 24] 62 Stat. 992. The complaint was filed in the Gutmann case (Civil Action No. 7715 in the court below) on September 9, 1947, and in the Howey case (Civil Action No. 7859 in the court below) on October 27, 1947. Judgments

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[5] On this general subject see the note and the collection of authorities therein, 1 A. L. R. 2d 222, 230, 239 *et seq.* See also 35 Georgetown Law Journal, 1; 56 Yale Law Review, 534 at 554 *et seq.* and 62 Harvard Law Review, 321 *et seq.*

were entered in both cases in the court below on January 4, 1949, the adjudications therefore being made after the effective date of revised Title 28. Section 39 of the Act of June 25, 1948, provides that "The sections or parts . . . of . . . [the] Statutes at Large enumerated in the following schedule are hereby repealed. Any rights or liabilities now existing under such sections or parts thereof shall not be affected by this repeal." It appears that the FTCA as amended, was repealed by the Act of June 25, 1948. See the schedule referred to in Section 39, 62 Stat. 1008. It would follow that if a loss of rights would occur if the provisions of revised Title 28 were to be applied, the provisions of the FTCA as they existed prior to the effective date of the revised title must be deemed to be governing. See note 6 cited to the text in Hoiness v. United States, 335 U. S. 297, 301. In United States v. Aetna Surety Co., 338 U. S. at p. 370, at note 5 cited to the text of Mr. Chief Justice Vinson's opinion, reference is made to what may be regarded properly as the key section of the FTCA, viz., Section 410(a), Section 931 of Title 28 U. S. C. (1946 ed.), and it is stated that "This section is now divided, and, with immaterial changes, appears in [revised Title] 28 U. S. C., Sections 1346(b) and 2674."

In the cited case the Supreme Court was considering the effect of R. S. 3477, the "anti-assignment" statute, 31 U. S. C. A. Section 203, and held that an insurance company could bring an action under the FTCA in its own name against the United States upon a claim to which it had become subrogated by payment to an insured who would have been able to bring such an action. The issue with which we are concerned in the instant case was not precisely in focus in the Aetna Surety Co. decision. We state this because it seems to us possible that the language of Section [fol. 25] 1346(b) of revised Title 28, United States Code, may be somewhat narrower in effect than the pertinent portion of Section 410(a) of the FTCA, 28 U. S. C. (1946 ed.) Section 931(a). We need not determine this question, however, for it is clear that the rights of the parties accrued before September 1, 1948, and, if the language of Section 1346(b) of revised Title 28 be narrower in scope, the instant cases must be determined under the FTCA as it existed prior to the date last stated. On the other hand if the words of Section 1346(b) do not effect any limitation of the rights of the parties we need not consider them here

for it is clear that they work no enlargement. Moreover, the FTCA as it existed prior to September 1, 1948, must be deemed to give the true congressional intent in respect to the rights of parties under the FTCA prior to the effective date of revised Title 28. We therefore shall consider the law as it existed prior to revised Title 28 and thus decide the instant cases.

The proponents of the United States as the sole or single party point out that Section 410(a) [6] of the FTCA, now 28 U. S. C. Sections 1346(b), 2402, and 2674, conferred exclusive jurisdiction upon United States district courts "sitting without a jury" to hear and determine claims "on account of personal injury" caused by the negligent act of [fol. 26] an employee of the Government, and that this presupposes a trial with the United States as the sole defendant since the Seventh Amendment requires, unless waived,

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[6] Section 410(a) was as follows:

"Subject to the provisions of this title, the United States district court for the district wherein the plaintiff is resident or wherein the act or omission complained of occurred, including the United States district courts for the Territories and possessions of the United States, sitting without a jury, shall have exclusive jurisdiction to hear, determine, and render judgment on any claim against the United States, for money only, accruing on and after January 1, 1945, on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States if a private person, would be liable to the claimant for such damage, loss, injury, or death in accordance with the law of the place where the act or omission occurred. Subject to the provisions of this title, the United States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances, except that the United States shall not be liable for interest prior to judgment, or for punitive damages. Costs shall be allowed in all courts to the successful claimant to the same extent as if the United States were a private litigant, except that such costs shall not include attorneys' fees."

a jury trial for any other defendant. The proponents of the theory that the United States may be joined as a defendant argue that because Section 410 (a) provided that the Government should be liable "under circumstances where the United States if a private person, would be liable to the claimant for such damage . . . in accordance with the law of the place where the act . . . occurred" and also that ". . . the United States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances . . .", Congress had made the rights and liabilities of the United States equivalent to those of a private litigant and such a waiver of immunity by the sovereign permits its joinder. In modern practice juries very frequently are waived in trials in United States district courts. Had a jury been insisted on by the private defendant in the instant case there was no valid reason why the trial judge and the jury respectively should not have determined the liability of the United States and that of the private defendant. Cf. Elkins v. Nobel, (D.C. N. Y.) 1 F.R.D. 357.

The United States asserts that since Section 410 (b) of the FTCA, now 28 U. S. C. Section 2676, provided that a judgment against the United States in a Section 410 (a) action should constitute a complete bar to any suit brought by the claimant against the employee of the Government whose negligence gave rise to the claim, the negligent government employee could not have been joined as a third-party defendant with the United States as a third-party defendant. Cf. Dickens v. Jackson (D.C. N.Y.) 71 F. Supp. 753. But this contention carries little weight respecting joinder or non-joinder of the United States though as a practical matter it has served to eliminate government employees as defendants in most suits.

In some of the cases deciding in favor of non-joinder much is made of the fact that Section 412 of the FTCA, now [fol. 27] 28 U. S. C. Sections 1291, 1504, 2110, provided an alternative appeal from a judgment of a United States district court either to the appropriate court of appeals or to the Court of Claims of the United States. Section 412 provided, if the appeal was to the Court of Claims, that the notice of appeal, required by Rule 73, FRCP, should have endorsed upon it the written consent of all the appellees to the appeal as taken. Putting aside questions as to the power of Congress to have provided for an appeal from an

Article III court to an Article IV court or to have conferred upon the Court of Claims of the United States in the terms of Section 412 ". . . the same powers and duties [respecting appeals] as those conferred on a . . . court of appeals", it can be cogently argued that since the United States can be the only defendant in a suit in the Court of Claims, it must have been the congressional intent that the United States should be the sole appellant or the sole appellee in a suit arising under the FTCA for otherwise the Court of Claims might have been compelled to deal with the rights and obligations of the United States as a defendant in conjunction with those of other defendants, a course theretofore prohibited to it. This argument has weight.[7] Cf. §§ 1504 and 2106 of revised Title 28, United States Code.

Section 420 provided a period of one year for bringing suit on account of personal injuries. Cf. 28 U. S. C. Section 2401(b), as amended. Many of the statutes of limitations of the States governing suits for personal injuries are of longer duration. In Pennsylvania the limitation upon suits for personal injuries is two years. See 12 P.S. Pa. § 34. It can be argued therefore that Congress did not intend to permit joinder because a private defendant might be kept in the suit while the United States was eliminated. Such a result would be somewhat anomalous but as was pointed out by Judge Yankwich in 9 F.R.D. at pp. 153-4, the FTCA was a statute of *creation*.

[fol. 28] Section 422, now 28 U. S. C. Section 2678, provided for the payment of attorney's fees by the United States in the cases of successful litigants and prescribed criminal penalties for any attorney whose compensation exceeded 20% of the sum recovered under the FTCA. It is said that joinder of the United States with a private defendant would have rendered such a provision inoperable. This position is untenable.

There are other considerations advanced by Yellow Cab or in the decided cases, which require discussion. Section

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[7] No serious question of constitutionality can arise in the setting of the cases at bar. Cf. National Ins. Co. v. Tidewater Co., 337 U. S. 582. The appeal to the Court of Claims is a permissive one and the cases were brought here and not to the Court of Claims.

411, now repealed in pertinent part,[8] provided expressly that the practice and procedure under the FTCA should be in accordance with the Federal Rules of Civil Procedure. This was a shotgun proviso, however, and though it is urged, as is the fact, that Rule 20 (a) authorizes joinder, we cannot find this very persuasive.

A cogent argument in favor of joinder, however, lies in the fact that while Section 421, now 28 U.S.C. Section 2680, set out twelve exemptions from the operation of the FTCA, not one of them prohibited joinder or made any reference to subrogation or contribution. Cf. Old Colony Ins. Co. v. United States (6 Cir.) 168 F. 2d 931.

Though the legislative history of the FTCA is inconclusive, it will be observed that the report of the Committee on the Judiciary of the House of Representatives dated November 26, 1945, H. Rept. 1287, 79th Cong., 1st Sess., accompanying H.R. 181, entitled "Tort Claims Against the United States", stated respecting Section 301 of that bill, substantially the equivalent in language of Section 410 of the FTCA, that "It is intended that the district courts in exercising jurisdiction . . . shall exercise essentially the [fol. 29] same type of jurisdiction as district courts exercise concurrently with the Court of Claims of the United States under the Tucker Act . . . The bill therefore does not permit any person to be joined as a defendant with the United States . . ." It should be noted that S. Rept. 1400, the report of the Special Committee on the Reorganization of Congress, accompanying S. 2177, 79th Cong. 2d Sess. which became Public Law No. 601, the Legislative Organization Act, Title IV of which is the FTCA, contained no such statement. It may be argued with some plausibility, therefore, that the earlier intention of the members of the Judiciary Committee of the House of Representatives to eliminate joinder of the United States was not insisted upon. In referring to the Federal Tort Claims title of S. 2177, S. Rept. 1400 stated that this title was almost identical with

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[8] See Schedule of Laws Repealed, following Section 39 of the Act of June 25, 1948, revised Title 28, United States Code, "Judiciary and Judicial Procedure," 28 U. S. C. A. as appears. See also S. Rept. 1559, 80th Cong., 2d Sess., accompanying H. R. 3214, in which the view was taken that the provision contained in Section 411 relating to the Federal Rules of Civil Procedure was unnecessary.

that which was incorporated in H.R. 181, with the exception that the $10,000 limitation had been removed. The report said respecting Section 410 of the FTCA, which was the same as Section 301 of H.R. 181: "The trial will be without a jury as is now the case in suits under the Tucker Act. The liability of the United States will be the same as that of a private person under like circumstance, in accordance with the local law, except that no punitive damages and no interest prior to judgment may be recovered." From the foregoing it may be concluded that it was not the intention of Congress to cause the United States to be treated in a different manner from any private litigant in respect to joinder and that the feature of the Tucker Act foremost in the mind of Congress was trial to the court without a jury.[9]

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[9] The argument of the United States respecting legislative history may be summed up as follows:

The Federal Tort Claims Act was included in Title IV Public Law No. 601, enacted by the 2nd Session of the 79th Congress. H.R. 7236, introduced in the 76th Congress 1st Sess., S. 2221 (passed by the Senate) and H.R. 6463 introduced in the 77th Congress 2nd Sess., S. 1114 in the 78th Congress 1st Sess., and H.R. 181 in the 79th Congress are to some degree progenitors of the present Act. Section 403 of H.R. 6463 read as follows: "If the damage, loss, injury, or death with respect to which a claim is made pursuant to this Act is caused under circumstances creating a legal liability on the part of some person other than an employee of the Government to pay damages therefor, jointly or severally with the United States, the award or judgment against the United States shall be only for the pro rata share of the damages in proportion to the number of parties so jointly or severally liable." Section 403 of S. 1114 contained substantially the same language. The United States points out that when the FTCA was enacted the language expressly providing for joinder and contribution was omitted. This, it is contended, demonstrates that Congress did not intend that joinder should be made or contribution should be effected.

We do not find this argument persuasive though, of course, it carries some weight. We adhere to the view that if Congress had intended to prohibit joinder it would have

[fol. 30] Emphasis may also properly be laid on the practice in admiralty under Section 3 of the Suits in Admiralty Act, 46 U.S.C.A. Section 743, where the language employed is very similar to that contained in Section 410 (a) of the FTCA.[10] There is no doubt that the United States can be impleaded by the respondent under Admiralty Rule 56. See Brady v. Roosevelt S.S. Co., 317 U. S. 575, and Hust v. Moore-McCormack Lines, 328 U. S. 707.

Upon consideration of all of these factors we conclude that the FTCA must be construed to have authorized suits against the United States not only when the United States was the sole or single defendant but also when the United States was joined with another defendant or defendants. Though there is room for doubt our conclusion expresses our best judgment in respect to the issue involved. But can contribution be exacted from the United States under the FTCA in the cases at bar? This is a closely allied question.

Contribution is a right arising under the substantive law of the States. The pertinent Pennsylvania statute, as we have said, is the Act of June 24, 1939, P.L. 1075, 12 P.S. Pa. § 2081, which provides that "Contribution shall be enforceable among those who are jointly or severally liable for a tort where, as between them, such liabilities are either all primary or all secondary." See Fisher v. [fol. 31] Diehl, 156 Pa. Super. 476, 482, 40 A. 2d 912, 916, and Kravas v. Great Atlantic & Pacific Tea Co. (D.C. Pa.) 28 F. Supp. 66. The United States has been found equally guilty with Yellow Cab by the court below. It would follow that if the United States were a private party it would be primarily liable as a joint tort-feasor and contribution could

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done so by express mandate in the statute or by unmistakable legislative history in the reports accompanying the legislation as it was enacted. See the rules for the construction of legislative history as laid down by the Supreme Court of the United States by Mr. Justice Pitney in Duplex Co. v. Deering, 254 U. S. 443, 474-477.

[10] Section 743 in pertinent part read as follows:

> "Such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties. . . ."

be enforced against it by Yellow Cab under the Pennsylvania statute cited. But could contribution from the sovereign to Yellow Cab fall within the purview of the FTCA? Did the waiver of immunity by the sovereign go so far? We think that it did.

The provisions of Section 410 (a)[11] seem conclusive in this connection for that section conferred exclusive jurisdiction upon the United States district courts to render judgment on any claim against the United States "on account of personal injury . . .". Note that the jurisdiction of the United States district courts was not limited to the adjudication of *claims for damages.* The word "claimant" used in the statute was employed to designate any person who might assert the claim and was *not* limited to one who had sustained damage to his property or injury to his person. In other words a "claimant" in the eye of the statute was any one who had a claim against the United States *on account* of personal injury or damage to property. Broader phrases or words more likely to embrace liability generally are difficult to imagine. A joint tortfeasor would have a claim on account of personal injury as would a subrogee. This point was settled by the decision of the Supreme Court in United States v. Aetna Surety Co., *supra.* It would seem to have been the intention of Congress to put the United States on a precise parity with the [fol. 32] private litigant in suits cognizable under the FTCA. See Moore's Federal Practice, 2nd ed., Vol. 3, pp. 2730-2739.

The judgments in the instant cases are cast in proper form for it will be observed that at each number (Civil

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[11] Cf. the pertinent provisions of Section 1346(b) of revised Title 28, United States Code, as follows: ". . . the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." Cf. note 6, *supra.*

Action No. 7715 in the case of the Gutmanns, and Civil Action No. 7857 in the case of the Howeys) the judgments were first found against Yellow Cab and the court then ordered that judgments be entered in favor of Yellow Cab and against the United States for one-half of the amounts. The Pennsylvania law and practice do not require the existence of a joint judgment before a claim for contribution can be enforced against the joint tort-feasor.[12] The Pennsylvania third-party practice is within the purview of Rule 14(a), FRCP. Separate suits could have been filed against the United States by Yellow Cab, the United States being the sole defendant, and judgments of contribution could thus have been obtained by Yellow Cab. The principle of United States v. Sherwood, 312 U. S. 584, 587-8, arising under the Tucker Act, would be inapplicable even by way of analogy for such judgments would have been obtained in suits in which the United States was the sole defendant. In the instant cases the learned trial judge could have terminated the proceedings after judgments had been rendered in favor of the Gutmanns and the Howeys against Yellow Cab, and then could have proceeded to give separate trials to the United States on the issue of contribution. Surely the stricture of the Sherwood case, even if it were deemed to be applicable to cases involving joinder of the United States arising under the FTCA, would not serve to require second, separate trials with the United States as the sole defendant, the issue being one of contribution, for such second, separate trials would embrace the same evidence as that already received and would be conducted before the same judge. Cf. United States v. Aetna Surety Co., *supra.*

[fol. 33] It is urged that somehow and in some way there might be a difference in quality, and therefore in result, in a trial in which the liability of two joint tort-feasors is adjudicated as compared to a trial in which the right of one tort-feasor to exact contribution from another is determined even if the trials were to be proceeded with in the same court and before the same judge. This argument

[12] Note that in the case of Fisher v. Diehl, 156 Pa. Super. 476, 40 A. 2d 912, the wife could not sue the husband for negligent personal injuries. Therefore, a joint judgment could not have been obtained by her.

would seem to be based on the proposition that the liability of the United States would somehow be enlarged, or it would be placed in an invidious position because its blameworthiness is determined in a suit with that of another defendant. Such an argument seems divorced from reality. But in any event the short answer to it is that the doctrine of the Sherwood case is inapplicable by way of analogy to the instant cases for it was apparently the intention of Congress to cause the United States to stand in equality with the private litigant in suits arising under the FTCA.

The judgments of the court below will be affirmed.

Judge O'Connell heard the argument and participated in the consideration of these appeals but died before the opinion was filed.

A true Copy:

Teste:

—— ——, Clerk of the United States Court of Appeals for the Third Circuit.

[fol. 33] IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10467

CAPITAL TRANSIT COMPANY, Appellant,

v.

UNITED STATES OF AMERICA, Appellee

Appeal from the United States District Court for the District of Columbia

Argued March 29, 1950. Decided June 5, 1950

Mr. Frank F. Roberson, with whom Mr. George D. Horning Jr., was on the brief, for appellant.

Mr. Marvin E. Frankel, Attorney, Department of Justice, of the Bar of the Court of Appeals of New York, pro hac vice, by special leave of Court, with whom Assistant Attorney General Morison, George Morris Fay, United States Attorney, Paul A. Sweeney, Attorney, Department of Justice, and Messrs. Joseph M. Howard and Joseph F. Goetten, Assistant United States Attorneys, were on the brief, for appellee.

Before Clark, Washington, and Kimbrough Stone,* Circuit Judges

OPINION

WASHINGTON, Circuit Judge:

This case presents the question whether under the Federal Tort Claims Act [1] the United States may be joined as a third party defendant in a suit between private litigants, when the purpose of such joinder is to secure contribution from the United States as a joint tort feasor.

The plaintiff, Kenneth Neil Stradley, filed suit for damages for personal injuries against the Capital Transit Com-

* Sitting by designation.

[1] Act of August 2, 1946, c. 753, Title IV, 60 Stat. 842, as amended. See 28 U. S. C. (1950 ed.) §§ 1346(b), 2671-2680 (codifying the major sections of the Act).

pany, appellant here, alleging negligence. Capital sought and obtained leave of court to make the United States a third party defendant, alleging that the negligence of a Government employee was the sole or the contributing cause of any injury which plaintiff sustained, and requesting that the United States be held liable for a contributable portion of any sum which might be adjudged against Capital in plaintiff's favor. Upon motion by the United States to dismiss the third party complaint for failure to state a cause of action upon which relief could be granted, the District Court entered a final judgment dismissing that complaint with prejudice.

[fol. 34] The Federal Tort Claims Act provides, in part, as follows:

> "Subject to the provisions of this title, the United States district court for the district wherein the plaintiff is resident or wherein the act or omission complained of occurred, including the United States district courts for the Territories and possessions of the United States, sitting without a jury, shall have exclusive jurisdiction to hear, determine, and render judgment on any claim against the United States, for money only, accruing on and after January 1, 1945, on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death in accordance with the law of the place where the act or omission occurred. Subject to the provisions of this title, the United States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances, except that the United States shall not be liable for interest prior to judgment, or for punitive damages. Costs shall be allowed in all courts to the successful claimant to the same extent as if the United States were a private litigant, except that such costs shall not include attorneys' fees." (Section 410(a), act of August 2, 1946, c. 753, Title IV, 60 Stat. 842)

The District Court in dismissing the third party complaint held that a suit for contribution was not one for "money damages for . . . personal injury or death," within the meaning of the Federal Tort Claims Act. Capital contends that this judgment was erroneous in that it too narrowly construed the waiver of sovereign immunity contained in the Federal Tort Claims Act; that the Act specifically provides that the United States shall be liable to the same extent and in the same manner as a private person; that the clear intendment was that local law should determine whether there is a right of contribution by the joint tort feasors; and that under the law of the District of Columbia, if the United States were a private person, it would be liable for contribution under the circumstances here presented. Appellant further argues that under the Act the United States has made itself amenable to the third party practice provided for in the Federal Rules of Civil Procedure and, accordingly, that the United States properly may be impleaded. The United States contends, first, that even if a suit for contribution is permissible under the Tort Claims Act, still the United States may not be joined as a third party defendant in a suit between private litigants; and, second, that in any event a suit for contribution is not within the scope of the Federal Tort Claims Act, not being a suit sounding in tort.

We have recently held, in *Sappington* v. *Barrett*, — U. S. App. D. C. — (decided April 14, 1950), that the United States cannot be joined as a co-defendant, to enforce liability as a joint tort feasor, in a suit between private litigants. In the instant case, we have the parallel question whether the United States can be joined as a third party defendant in such a suit. The United States Court of Appeals for the Third Circuit recently considered both ques- [fol. 35] tions—joinder of the United States as a joint tort feasor and its joinder as a third party defendant. It concluded that both types of joinder were permissible. *Howey* v. *Yellow Cab Co.* v. *United States; Gutmann* v. *Yellow Cab Co.* v. *United States*, — F. 2d — (decided April 27, 1950).[2]

We are constrained to disagree with the learned judges of the Third Circuit. The Act itself does not deal directly with the question of joinder. The legislative history, how-

[2] The actual question in both cases related to joinder of the United States as a third party defendant.

ever, deals with that question very clearly and positively. And the character and framework of the Act, as well as its legislative history, impel us to the conclusion that the United States has not consented to be joined either as a co-defendant or as a third party defendant in a suit between private litigants.

The Tort Claims Act was passed as one chapter of the Legislative Reorganization Act of 1946. Its purpose was twofold. First, it was to provide convenient administrative and judicial remedies to those injured through the fault of a Government employee. Previously, relief ordinarily could only be secured by obtaining passage of special bills by Congress. The second purpose of the Act was to relieve congressional committees of the overburdening work of considering these special bills, involving as it did the task of determining whether the United States should pay to private persons damages for injuries they had allegedly sustained because of the negligence of employees of the Government. Sen. Rep. No. 1400, 79th Cong., 2d Sess., pp. 29-31. Thus, as a matter of function, in cases under the Tort Claims Act the District Courts are sitting in substitution for congressional committees, i. e., on a basis similar to the Court of Claims. *Drummond* v. *United States*, 78 F. Supp. 730-31. This is suggestive of the type of jurisdiction Congress intended to confer. And the report on House Bill 181, 79th Congress, 1st Session, makes explicit the congressional intent that no person should be permitted "to be joined as a defendant with the United States." House Bill 181 was substantially identical with the Tort Claims Act as finally passed.[3] The House Committee reporting on that bill said:

> "It is intended that the district courts in exercising jurisdiction under this title shall exercise essentially

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[3] See Sen. Rep. No. 1400, 79th Cong., 2d Sess., p. 30; Brooks v. United States, 337 U. S. 49, 52. The Tort Claims Act has a long legislative history, having been submitted to Congress in many forms and for many years prior to its enactment. See Brooks v. United States, *supra*, at 51. The report accompanying the Tort Claims Act as finally enacted (Sen. Rep. 1400) was a report on the entire Legislative Reorganization Act, of which the Tort Claims Act was but one of seven titles. Accordingly, Sen. Rep. 1400 contained a relatively brief description of the Act. And, unlike H. R.

> the same type of jurisdiction as district courts exercise concurrently with the Court of Claims of the United States under the Tucker Act (act of March 3, 1887, 24 Stat. 505; 28 U. S. C. sec. 41 (2)). *The bill therefore does not permit any person to be joined as a defendant with the United States* and does not lift the immunity of the United States from tort actions except as jurisdiction is specifically conferred upon the district courts by this bill. See *United States* v. *Sherwood*, 312 U. S. [fol. 36] 584 (1941); *Lynn* v. *United States*, 110 F. (2d) 586, 588 (C. C. A. 5th, 1940); *Waite* v. *United States*, 57 C. Cls. 546 (1922); *Jackson* v. *United States*, 27 C. Cls. 74, 84 (1891).) The phrase 'as a court of claims' in section 301 of the Senate bill was deleted as surplusage." (H. R. Rep. 1287, 79th Cong., 1st Sess., p. 5) (Emphasis supplied)

Among the cited authorities in that report was *United States* v. *Sherwood*, 312 U. S. 584. There the question was whether or not a private party could be joined with the United States in a suit under the Tucker Act. The Court of Appeals had held in the affirmative, relying among other things on the joinder provisions of the Federal Rules of Civil Procedure. 112 F. 2d 587. The Supreme Court reversed, holding that the United States had not consented to be sued under the Tucker Act along with a private party,

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Rep. 1287, *infra*, which accompanied House Bill 181, Sen. Rep. 1400 makes no specific reference to the problem of joinder. The Court of Appeals for the Third Circuit observed that "the legislative history of the FTCA is inconclusive. . . ." It expressed the view, however, that the omission of any reference to joinder in Sen. Rep. 1400 indicated "that it was not the intention of Congress to cause the United States to be treated in a different manner from any private litigant in respect to joinder." Howey v. Yellow Cab Co., *supra*. But as we have noted, Sen. Rep. 1400 was not a detailed report; it merely outlined the major features of the Act. And, as has been pointed out, it was recognized in the report that with but one exception of substance, the Act is the same as House Bill 181, discussed in H. R. Rep. 1287, *infra*. We therefore consider it proper to give weight to H. R. Rep. 1287. See Uarte v. United States, 7 F. R. D. 705, 708-709.

and that therefore the District Court lacked jurisdiction of the suit against the United States. It further held that even if the Federal Rules were applicable they merely set out the manner in which jurisdiction was to be exercised and could not confer jurisdiction upon the Federal courts. While the *Sherwood* case is not, in the strict sense, controlling, we think its reasoning applicable here.[4] It is true that, unlike the Tort Claims Act, the Tucker Act specifically provided that the District Courts were to have jurisdiction concurrent with the Court of Claims, and that this influenced the Supreme Court's determination that joinder was not permissible. But Congress could not have provided in the Tort Claims Act that the District Courts shall have jurisdiction *concurrent* with the Court of Claims, as it did under the Tucker Act, for the reason that the Court of Claims does not exercise original jurisdiction in tort cases. And, as H. R. Rep. 1287 states, the type of jurisdiction to be exercised was referred to, in bills forming part of the history of the Tort Claims Act, as that of a court of claims. While that reference was deleted in the final draft as surplusage, we think the purpose and framework of the statute demonstrate that the District Courts, under the Act as under its predecessor bills, are sitting substantially as courts of claims.

The Act provides that upon the consent of all appellees an appeal may be taken to the Court of Claims from the [fol. 37] District Courts. 28 U. S. C. § 1504. The Supreme Court has said: "The Court of Claims is a legislative, not a constitutional, court. Its judicial power is derived not from the Judiciary Article of the Constitution, but from the

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[4] Sec. 411 of the Tort Claims Act provided that practice and procedure shall be in accordance with the Rules of Civil Procedure. When Title 28 was revised and codified, this section was omitted as surplusage, "since other provisions of the title provide that tort claims shall be asserted in civil actions, and that the Rules of Civil Procedure promulgated by the Supreme Court shall apply to all civil actions." Sen. Rep. No. 1559, 80th Cong., 2d Sess. (Amendment No. 61). This deletion makes clear that Congress, in the Tort Claims Act, did not intend, by reference to the Rules of Civil Procedure, to grant a greater measure of jurisdiction than had been indicated elsewhere in the Act, but merely to make the Rules applicable where jurisdiction existed.

Congressional power 'to pay the debts . . . of the United States'). . . ." *United States* v. *Sherwood, supra*, at 587. It seems unlikely that Congress intended the Court of Claims to determine judicial controversies between private litigants, something completely outside its normal function. Yet that result might follow from joinder of the United States with other defendants. "To magnify the anomaly, suppose the United States did not appeal, or was successful in the lower court while the other defendants were not, and thus put before the Court of Claims only private litigants." *Drummond* v. *United States*, 78 F. Supp. 730, 732. These factors are not conclusive. But they gain meaning when we note that as against the United States no jury trial may be had under the Act (28 U. S. C. § 2402 (1950 ed.)), while in suits between private litigants there is ordinarily a jury trial as a matter of right. Therefore, if joinder were permitted, the Court of Claims might have to review jury verdicts, clearly beyond the scope of its usual province, as well as non-jury determinations.

Apart from review by the Court of Claims, the question of jury trials presents a real problem if joinder is permissible. Particularly is this true of joinder of the United States as a third party defendant. In the present suit, for example, the United States would be permitted under the Rules of Civil Procedure (Rule 14a) to assert, in addition to its own defenses against a third party plaintiff, any defenses against the plaintiff's claim which the third party plaintiff may have. This opens up the possibility of the court and jury reaching opposite conclusions on the same questions. For the jury might find the defendant (third party plaintiff) liable to the plaintiff, finding against the third party plaintiff on all defenses asserted, while the court, at the same time, absolved the United States (third party defendant) of liability, finding, on the identical defenses, that the third party plaintiff was not liable to the plaintiff and, accordingly, that there was no right of contribution. Paradoxical possibilities of this sort are certainly indicative that Congress did not intend to permit such joinder.

Appellants contend that because the Act provides that the liability of the United States is to be the same in manner and extent as that of a private individual (28 U. S. C. § 2674) it must follow that the United States can be joined as third party defendant in litigation where a private

person would be amenable to such joinder. This contention has much force, *in vacuo*. But when the provision is read within the framework of a comprehensive scheme permitting suit against the Government, and with due consideration of legislative history, it becomes clear that the reference is only to "the jurisdiction of the claim and the liability for the claim," and not to "other incidents of litigation," such as the susceptibility of the United States to be joined in a suit between private parties. *Drummond* v. *United States, supra,* at 731. This is borne out by the fact that, in the very paragraph spelling out the liability of the United States, Congress provided that trial against the United States should be by the court without a jury, whereas, as we have noted, between private litigants jury trial is of right. Section 410 of the Act, now 28 U. S. C. [fol. 38] § 2402. The Act also provides a different rule as to venue than is the case in suits between private litigants. Compare 28 U. S. C. § 1402(b) with § 1391. And a special statute of limitations. 28 U. S. C. § 2401. The reference to liability merely means that the same substantive law should govern the question whether an employee of the United States had committed a tortious act for which the United States was responsible, and that the same measure of damages should be applicable, as if the United States were a private party. Sen. Rep. No. 1400, 79th Cong., 2d Sess., p. 32.

Thus, whether we approach the problem as one of merely interpreting the face of the statutory language, or whether we go behind that language to the history of the Act, we must reach the same conclusion, namely, that Congress did not intend the United States to be joined as a third party defendant. In our view, therefore, the Tort Claims Act does not permit the joinder of the United States either as a co-defendant (*Sappington* v. *Barrett, supra*), or as a third party defendant, in a suit between private litigants.

Joinder of parties is ordinarily no more than a question of procedure, and Rule 21 of the Federal Rules of Procedure provides that misjoinder of parties is not grounds for dismissal of an action. But in suits against the United States, such as the present, a different principle prevails. For the United States may only be sued in the manner and according to the procedure to which it has consented. The statute waiving sovereign immunity creates the bounds of the jurisdiction of the Federal courts in entertaining suit

against the United States. *United States* v. *Sherwood, supra.*

The Supreme Court has recently held that an insurance company can sue under the Tort Claims Act in its own name, on a claim to which it had become subrogated by reason of payments to the insured. *United States* v. *Aetna Casualty & Surety Co.*, — U. S. —, 18 U. S. L. WEEK 4060, 4064, decided December 12, 1949. In that case, Chief Justice Vinson, speaking for the court, said:

> "We think that the congressional attitude in passing the Tort Claims Act is more accurately reflected by Judge Cardozo's statement in *Anderson* v. *Hayes Construction Co.*, 243 N. Y. 140, 147: 'The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced.' "

The holding of the Supreme Court in the *Aetna* case represented a broad construction of the Act. But it was one which was amply supported by the purpose, structure and legislative history of the statute. In the present case, even applying the generous view laid down for us in the *Aetna* decision, we find that purpose, structure and history lead us to but one result—a result unfavorable to joinder.

Since we hold that the District Court had no jurisdiction to entertain the third party complaint, we need not here decide whether, in a separate action, appellant here may enforce whatever right to contribution it may have against the United States. Accordingly, without prejudice to the maintenance of such a suit, the judgment of the District Court dismissing the third party complaint is.

Affirmed.

[fol. 40] [Stamp:] United States Court of Appeals for the District of Columbia Circuit. Filed Jun. 5, 1950. Joseph W. Stewart, Clerk.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, APRIL TERM, 1950

No. 10467

CAPITAL TRANSIT COMPANY, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee

Appeal from the United States District Court for the District of Columbia

Before Clark, Washington, and Kimbrough Stone, Circuit Judges

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

Per Circuit Judge Washington.

June 5, 1950.

[fol. 41] [Stamp:] United States Court of Appeals for the District of Columbia Circuit. Filed Jun. 8, 1950. Joseph W. Stewart, Clerk.

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10467

CAPITAL TRANSIT COMPANY, a Corporation, Appellant,

v.

UNITED STATES OF AMERICA, Appellee

DESIGNATION OF RECORD

The Clerk will please prepare a certified transcript of record for use on petition to the Supreme Court of the United States for writ of certiorari in the above entitled cause and include therein the following:

(1) Joint appendix to appellant's brief.

(2) Appendix to appellant's brief setting forth statutes and Rules involved.

(3) Minute entry of argument.

(4) Appellant's motion for leave to file copy of subsequent opinion and order thereon.

(5) Opinion of the United States Court of Appeals for the Third Circuit in cases Nos. 9966 and 9967, *Howey* v. *Yellow Cab Co.* v. *United States of America*, and *Gutmann* v. *Yellow Cab Co.* v. *United States of America*, decided April 27, 1950.

(6) Opinion of this Court decided June 5, 1950.

(6a) Judgment.

(7) This designation.

(8) Clerk's certificate.

George D. Horning, Jr., Frank F. Roberson, Attorneys for Appellant, 810 Colorado Building, Washington, D. C.

[fol. 42] CERTIFICATE OF SERVICE

A copy of the foregoing designation of record was mailed this 8th day of June, 1950, to H. G. Morison, Esq., Assistant Attorney General of the United States, Department of Justice, Washington, D. C.

George D. Horning, Jr., Frank F. Roberson, Attorney for Appellant.

[fol. 43] UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

I, Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia Circuit, hereby certify that the foregoing pages numbered from 1 to 42, both inclusive, constitute a true copy of the joint appendix to the briefs of the parties, and of the proceedings in the said Court of Appeals, as designated by counsel, in the case of: Capital Transit Company, Appellant, v. United States of America, Appellee, No. 10467, April Term, 1950, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this fifth day of July, A. D. 1950.

Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia Circuit.
(Seal.)

[fol. 42] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 9, 1950

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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FILED
JUL 18 1950
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 204

CAPITAL TRANSIT COMPANY, *Petitioner*,

v.

THE UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

GEORGE D. HORNING, JR.,
FRANK F. ROBERSON,
Counsel for Petitioner.

July 18, 1950.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No.

CAPITAL TRANSIT COMPANY, *Petitioner*,

v.

THE UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To The Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Capital Transit Company, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above captioned case on June 5, 1950.

OPINIONS BELOW

The opinion of the District Court (R. 7-10) is reported in 87 F. Supp. 94. The opinion of the United States Court of

Appeals for the District of Columbia Circuit (R. 33-38) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 5, 1950. (R. 39.) The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

QUESTION PRESENTED

Whether under the Federal Tort Claims Act the United States may be joined as a third party defendant upon a claim for contribution as if it were a private litigant.

STATUTE AND RULE INVOLVED

The pertinent provision of Rule 14(a) of the Federal Rules of Civil Procedure, on Third-Party Practice, and of the Federal Tort Claims Act are printed in the appendix appearing in the Transcript of Record. (R. 17, 14-16.)

STATEMENT

On June 9, 1949, Kenneth Neil Stradley filed a complaint in the United States District Court for the District of Columbia seeking $50,000 damages from petitioner, Capital Transit Company, for personal injuries allegedly sustained on August 4, 1947, in a collision between petitioner's streetcar upon which he was a passenger, and a Ft. Meyer, Virginia jeep. (R. 1-2.) Petitioner sought and obtained leave of court to make the United States a third-party defendant upon the ground that the collision was solely or contributorily caused by the negligence of a Government employee, and judgment-over was sought against the United States for a contributable portion of any judgment awarded Stradley against petitioner. (R. 3, 5, 4-5.) The United States moved to have the third-party complaint dismissed for failure to state a cause of action. (R. 6-7.) After argu-

ment, the District Court rendered an opinion, on October 26, 1949, that a claim for contribution was not permissible under the Federal Tort Claims Act and entered final judgment dismissing the third-party complaint. (R. 7-10, 11-12.)

The court below affirmed the action of the District Court upon the ground that, irrespective of whether contribution came within the liability created by the Federal Tort Claims Act, such a claim could not be asserted in a third-party complaint. (R. 33-38.) The opinion recognized (R. 34-35) that its conclusion was squarely opposed to the holding of the United States Court of Appeals for the Third Circuit in *Howey* v. *Yellow Cab Co.* v. *United States*, 181 F. 2d 967 (April 27, 1950).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals for the District of Columbia Circuit erred:

1. In holding that a claim against the United States for contribution cannot be entertained through the procedure of a third-party complaint.

2. In failing to hold that the Federal Tort Claims Act permits a claim for contribution against the United States which is maintainable through the same third-party procedure as in the case of private joint tort feasors.

3. In affirming the order of the District Court.

REASONS FOR GRANTING THE WRIT

1. The decision of the court below in the instant case is directly in conflict with the decision of the United States Court of Appeals for the Third Circuit in *Howey* v. *Yellow Cab Co.* v. *United States*, 181 F. 2d 967 (1950) (R. 29-32.) This conflict was conceded in the court below which frankly stated (R. 35):

We are constrained to disagree with the learned judges of the Third Circuit.

The court below was in part motivated by its own previous holding, in *Sappington* v. *Barrett and United States*, 182 F. 2d 102 (D. C. Cir. April 14, 1950), that the United States could not be joined as a co-defendant with a private tort feasor by a plaintiff to enforce liability. (R. 34, 38.) No writ of certiorari was sought in the latter decision, likewise believed by your petitioner to have been erroneously decided.

2. Clearly, the question presented is of importance in the administration of the Federal Tort Claims Act as it substantially affects the timing, manner of procedure and the area of private suit against the Government. Situations in which the Government is or may be jointly or concurrently negligent with another to cause injury to a third person will inevitably arise many times throughout the country, particularly in motor vehicle accident cases. Settlement of the questions of whether, and the manner in which, the Government may be called upon to bear its proportionate share of the sum awarded an injured person is plainly in the public interest, since the problem is likely to be presented in numerous litigated civil actions, and in addition many settlements advantageous to all concerned will be encouraged once the prospective defendants know their legal rights and liabilities under the national statute involved.

3. The decision below, by the United States Court of Appeals for the District of Columbia Circuit on a question of general importance is believed to be erroneous and the conflicting decision of the United States Court of Appeals for the Third Circuit in *Howey* v. *Yellow Cab Co.* v. *United States*, *supra*, correct. Moreover, in failing to allow contribution the District of Columbia decisions below probably conflict in principle with applicable decisions of this Court. In *United States* v. *Aetna Casualty & Surety Co.*, 338 U. S.

366 (1949), this Court *held* that an insurance company which had paid compensation to an injured worker could bring suit in its own name against the United States under the Federal Tort Claims Act. The Court, in its opinion by the Chief Justice pointed out, at 383:

> In argument before a number of District Courts and Courts of Appeals, the Government relied upon the doctrine that statutes waiving sovereign immunity must be strictly construed. We think that the congressional attitude in passing the Tort Claims Act is more accurately reflected by Judge Cardozo's statement in *Anderson* v. *Hayes Construction Co.*, 243 N. Y. 140, 147: "The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced."

Nevertheless, the District Court below frankly admitted that its holding was an application of the ancient rule of strict construction of statutes waiving sovereign immunity (R. 8-9), and the opinion below of the United States Court of Appeals for the District of Columbia Circuit, while paying lip-service to the *Aetna* case (R. 38), failed to apply its plain spirit and principle in declining to treat the United States as if it were a private litigant. There can be no question that in the District of Columbia a private person, situated as the Government is in the instant case, could be required to bear his proportionate share of a judgment in favor of the injured person through the procedure of a third-party complaint for contribution. *Knell* v. *Feltman*, 85 U. S. App. D. C. ———, 174 F. 2d 662 (1949). To be contrasted with the opinions of the District of Columbia courts is that of the United States Court of Appeals for the Third Circuit, in *Howey* v. *Yellow Cab Co.* v. *United States*, *supra*, which felt itself supported by the *Aetna* case in concluding that it was the intention of Congress (R. 30):

> * * * to put the United States on a precise parity with the private litigant in suits cognizable under the FTCA.

The effect of the District Court's dismissal of the third-party complaint herein is to create a thirteenth exception to the twelve which Congress enumerated in the Federal Tort Claims Act. Such judicial legislation conflicts in principle with the action of this Court, which in *Brooks* v. *United States*, 337 U. S. 49, 51 (1949), declined to be persuaded that the words "any claim" in the Federal Tort Claims Act meant "any claim but that of servicemen". The absence of an exception dealing with contribution was properly felt by the Third Circuit Court of Appeals in the *Howey* case to be a cogent argument in favor of joinder (R. 27), whereas in failing to sustain petitioner's contentions the Court of Appeals for the District of Columbia Circuit remained unmoved by this recognized principle of statutory construction.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

GEORGE D. HORNING, JR.,
FRANK F. ROBERSON,
Counsel for Petitioner.

July 18, 1950.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 204

CAPITAL TRANSIT COMPANY, *Petitioner*,

v.

THE UNITED STATES OF AMERICA, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

BRIEF FOR THE PETITIONER

GEORGE D. HORNING, JR.,
JOSEPH J. SMITH, JR.,
FRANK F. ROBERSON,
Counsel for Petitioner.

HOGAN & HARTSON,
Of Counsel.

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CAPITAL TRANSIT COMPANY, *Petitioner*,

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On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia (R. 6-8) is reported at 87 F. Supp. 94. The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 27-35) is reported at 183 F. 2d 825.

JURISDICTION

The judgment of the Court of Appeals was entered June 5, 1950 (R. 36). Petition for certiorari was filed July 18, 1950, and was granted October 9, 1950 (R. 39). The jurisdiction of this Court rests upon 28 U. S. C. § 1254 (1).

QUESTION PRESENTED

Whether under the Federal Tort Claims Act the United States may be joined as a third-party defendant upon a claim for contribution as if it were a private individual under like circumstances.

STATUTE AND RULE INVOLVED

Pertinent provisions of Federal Rule of Civil Procedure 14 (a), on third-party practice, and of the Federal Tort Claims Act,[1] are set forth in the Appendix of this brief, *infra*, pp. 28, 25-27.

STATEMENT

On June 9, 1949, Kenneth Neil Stradley filed a comp' int seeking from petitioner, Capital Transit Company, $50,000 damages for personal injuries allegedly sustained August

[1] The accident out of which this litigation arose occurred before the effective date (September 1, 1948, See Section 38 of the Act of June 25, 1948, 62 STAT. 992) of the new Judicial Code. The provisions of the Federal Tort Claims Act, Act of August 2, 1946, c. 753, Title IV, 60 STAT. 842, formerly codified as 28 U. S. C. § 931 *et seq.* are by the revision now distributed through various sections of the new code. The revision has been considered by the Revisers (H. R. REP. No. 308, 80th Cong., 1st Sess., p. A123) as constituting "change * * * in phraseology." The Government deems the two versions to have "immaterial" differences (Petition for certiorari, footnotes 1, 6, pp. 3, 7, *United States* v. *Yellow Cab Co.*, No. 218 this Term.) This Court has likewise considered the codification changes to be immaterial, see footnote 5, *United States* v. *Aetna Surety Co.*, 338 U. S. 366, 370 (1949). Since most decisions discuss the Act by its original section numbers rather than by reference to Judicial Code sections, the same course will be followed herein.

4, 1947, as the result of a collision between petitioner's streetcar, upon which Stradley was a passenger, and a Government vehicle from Ft. Meyer, Virginia (R. 1-2). Petitioner obtained leave of the District Court to make the United States a third-party defendant upon the claim that the collision was at least partially due to the negligence of a soldier in the course of his employment in operating the Government-owned vehicle, and judgment over was sought against the United States for a contributable portion of any judgment awarded Stradley against petitioner (R. 4, 3-4). The United States moved to have the third-party complaint dismissed for failure to state a cause of action (R. 5). The District Court, being of the opinion that a claim for contribution was not within the Federal Tort Claims Act waiver of immunity (R. 6-8), granted the motion (R. 8-9) and rendered final judgment dismissing the third-party complaint (R. 9-10).

The United States Court of Appeals for the District of Columbia Circuit affirmed the dismissal upon the ground that, irrespective of whether a claim for contribution was within the scope of the Federal Tort Claims Act, such an action could not be asserted in a third-party complaint (R. 27-35).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In holding that a contribution claim against the United States cannot be entertained through the third-party complaint procedure.

2. In failing to hold that the Federal Tort Claims Act permits a claim for contribution which is maintainable against the United States through the same third-party procedure available against a private individual under like circumstances.

3. In affirming the order of the District Court.

SUMMARY OF ARGUMENT

In the District of Columbia the amenability of a private person to a suit for contribution asserted in the third-party complaint of a concurrent tortfeasor is well-settled.

In unambiguous language, Congress in the Federal Tort Claims Act has directed that on any claim against the United States on account of personal injury caused by negligence of a Government employee while acting within the scope of his employment, under circumstances where the United States, if a private person, would be liable to the claimant under the law of the place where the negligence occurred, the United States shall be liable "*to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances*", except as to interest before judgment and punitive damages.

The Act specifically states that the Federal Rules of Civil Procedure are to govern the practice and procedure in actions thereunder. Those rules, while specifying in many particulars special treatment for the United States, do not except it from the third-party practice provided for in Rule 14.

Twelve exceptions enumerated by the Act from its coverage demonstrated the congressional desire that no thirteenth exception should be created by judicial construction. None of the twelve exceptions restricts from the wide scope of "any claim" on account of personal injury either a claim for contribution or the claims of subrogees or indemnitees.

The legislative history of the Act, shown in years of congressional consideration, establishes that Congress in passing the Act was seeking to increase its own efficiency and at the same time eliminate injustice to claimants by replacing the out-moded and monarchic system of private claim bills with a broad system of recovery as a matter of legal right rather than as a dispensation from considerations of sovereign grace. Both the letter and spirit of the Act demonstrate the intention that the Government was to

be put in the same position as any private party, and that the cases involving joint tortfeasors were to be determined by local law.

Strained analogies to statutes with a less liberal background and decisions applying thereto a doctrine of strict construction are contrary to the congressional attitude in passing the Tort Claims Act. Arguments premised upon a congressional intent to give a special and limited waiver of immunity are out of keeping with this statute's plainly expressed purpose to treat the Government like an individual unless otherwise stated. That Congress was aware that such a private party status would include contribution claims is clear from the long-standing practice in admiralty where joinder of the United States with a private defendant, as well as contribution, is a common occurrence. Fancied difficulties on the trial of trying a case as to one defendant to the jury and to the judge as to the United States have not impressed experienced trial judges. Such conjectural considerations under-estimate the power and ability of federal district judges to see that substantial justice is done in the district courts.

The opinions below mark a retrogressive step toward the inaccurate and unhappy concept that "the King can do no wrong", serve to defeat in an important respect the direction of the Federal Tort Claims Act that the United States, with certain enumerated exceptions, shall be treated as "a private individual under like circumstances", and are markedly contrary to the attitude of this Court which, in considering the Federal Tort Claims Act, has stated that since hardship enough is involved in the exemption of the sovereign from suit, "We are not to add to its rigor by refinement of construction where consent has been announced." *United States* v. *Aetna Surety Co.*, 338 U. S. 366, 383 (1949).

ARGUMENT

1. The Federal Tort Claims Act Without Ambiguity Directs That the United States Is to Be Liable on Any Claim On Account of Personal Injuries, With Specified Exceptions, in the Same Manner and to the Same Extent as a Private Individual Similarly Circumstanced.

In the District of Columbia it is clear that one of two joint or concurrent tortfeasors can, through Rule 14 (a) of the Federal Rules of Civil Procedure, recover contribution from the other tortfeasor involved in a two-vehicle collision which injures a plaintiff. Such a party-alignment is said to be an apt illustration of the "proper application of the third-party practice provided by that Rule." *Knell* v. *Feltman*, 85 U. S. App. D. C. 22, 24, 174 F. 2d 662, 664 (1949). Therefore, the inquiry is whether the United States, for the personal injury to Stradley, is to bear its fair share of any liability as would a similarly situated private employer.

a. Waiver of immunity by the United States of special treatment upon claims on account of personal injury caused by the negligence of Government employees plainly appears in the Federal Tort Claims Act.

Because of the traditional immunity of the sovereign from suit, statutory basis must be shown for an action for contribution. The Federal Tort Claims Act is the waiver statute in this instance. Section 410 (a), the heart of the Act, establishes the waiver by providing in pertinent part that the United States district court shall have jurisdiction:

> "* * * to hear, determine, and render judgment on *any claim* against the United States, * * * on account of * * * personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government * * *, under circumstances where the United States, *if a private person*, would be liable to the claimant for such * * * injury, or death in accordance with the law of the place where the act or omission occurred. Subject to the provisions of this title,

> the United States shall be liable in respect of such claims to the *same* claimants, in the *same* manner, and to the *same* extent *as a private individual under like circumstances*, except that the United States shall not be liable for interest prior to judgment, or for punitive damages. Costs shall be allowed in all courts to the successful claimant to the *same* extent as if the United States were a *private litigant*, except that such costs shall not include attorneys' fees." (Emphasis supplied.)

No plainer expression in common English usage could be conceived than "the United States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances" to convey the meaning that the Government was thenceforth to be on a precise parity with the private employer. No longer was the morally unjustifiable claim of "sovereign immunity" to offend the conscience of the Government. It would seem that such unequivocal language would have placed beyond cavil the equality of Government and governed insofar as responsibility for negligence of their employees was concerned.

That no special status under the Federal Tort Claims Act as to contribution claims or third-party practice was reserved to the United States is apparent both from the failure to mention them in the Act and from the express enumeration of the particulars in which there was to be special treatment: *e.g.*, the negligence has to be "within the scope" of employment (thus excluding mere automobile-ownership liability); the court is to sit "without a jury" as to the United States; interest prior to judgment, punitive damages and attorneys' fees as part of costs are not to be allowed against the Government. Obviously, any other normal incidents of such litigation applicable to private persons would fall within the direction for liability "in the same manner, and to the same extent" as a private individual under like circumstances.

b. THE FEDERAL RULES, INCLUDING THIRD-PARTY PROCEDURE, WERE EXPRESSLY MADE APPLICABLE TO TORT CLAIMS ACT ACTIONS.

Leaving nothing to construction, the Act provided in Section 411:

> "In actions under this part, the forms of process, writs, pleadings, and motions, and the practice and procedure, shall be in accordance with the rules promulgated by the Supreme Court pursuant to the Act of June 19, 1934 (48 Stat. 1064); and the same provisions for counterclaim and set-off, for interest upon judgments, and for payment of judgments, shall be applicable as in cases brought in the United States district courts under the Act of March 3, 1887 (24 Stat. 505)."

Here is express reference to the Federal Rules of Civil Procedure for the applicable practice and procedure, and to the Tucker Act as to counterclaim, set-off and interest and payment of judgments. In numerous instances, the Federal Rules specify special treatment of the United States, *e.g.*, Rules 4 (d) (Service of summons), 12 (a) (Time for answer), 13 (d) (Non-enlargement of counterclaim limits), 25 (d) (Time for substitution of parties), 37 (f) (Expenses for failure to make discovery), 39 (c) (Use of advisory jury with consent), 45 (c) (Non-tender of witness fees), 54 (d) (Costs against unsuccessful party), 55 (e) (Judgment by default only upon evidence to court), 62 (e) (Security upon stay of judgment), and 65 (c) (Security on temporary injunction). Rule 14 (a) provides no such special treatment for the United States as to third-party practice. There is no sound analogy to the Tucker Act under which individual defendants cannot be joined since the Tort Claims Act refers to the Tucker Act only in specified particulars, whereas the Federal Rules are to govern the general practice and procedure under the Act.

Interpreting the language of the Tort Claims Act as if it limited the district courts' jurisdiction to actions where the United States and only one other party appear in the same court room, ignores the congressional direction that the

United States is to be liable "in the same manner" as a private individual and that the "practice and procedure shall be in accordance" with the Federal Rules of Civil Procedure. The Government position in the case at bar stems from an insistence that it be treated in a favored manner contrary to the congressional direction that with stated exceptions the United States is to be "liable * * * in the same manner * * * as a private individual."

This Court has recognized in *United States* v. *Aetna Surety Co.*, 338 U. S. 366 (1949), that the claims of subrogees, not expressly mentioned in the Act, are within the district court jurisdiction. No logical reason appears why Congress in the increase of its efficiency would wish to relieve itself of the burden of direct and derivative claim bills and yet to remain the sole recourse on a claim for contribution from a joint tortfeasor with the Government. In the Tort Claims Act the Congress did not express any such illogical distinction as to the meaning of the "any claim" jurisdiction conferred upon the district courts. Indeed, the Executive Department of the Government, soon after enactment of the Statute, indicated that the scope of the Act was not then considered by it to be restricted to suits against the United States alone, when it resisted efforts of a private defendant to be freed from a joint action. See *Englehardt* v. *United States*, 69 F. Supp. 451, 454 (D. Md. 1947).

c. THE EXCEPTIONS ENUMERATED FROM THE COVERAGE OF THE ACT SHOW THAT NO FURTHER EXCEPTIONS WERE TO BE IMPLIED.

Conclusions compelled by the language of both the jurisdictional and procedural sections of the Act are that contribution is allowable since a private person would be liable therefor (Sec. 410 (a)), and that third-party practice is the proper mechanical means of enforcing the liability since the Federal Rules of Civil Procedure are to govern (Sec. 411). These conclusions receive additional confirmation from consideration of Sec. 421, the "exceptions" portion of the

statute, which in subsections (a) through (l) delineates with particularity the twelve situations in which the otherwise all-inclusive "any claim" jurisdiction is not to apply.

Excepted by Section 421 is any claim:

(a) "based upon" a discretionary function; "arising out of" (b) transmission of postal matter, (c) administration of the Trading with the Enemy Act, (h) enumerated actions including certain intentional wrongs, defamation and interference with contract rights, (j) combatant activities of the armed forces in time of war; "arising in respect of" (c) the assessment or collection of taxes or the detention of goods; (d) for which a remedy against the United States is provided by the Suits in Admiralty or the Public Vessels Act; "for damages caused by" (f) a United States quarantine, or (i) fiscal operations of the Treasury; "arising from" (g) injuries while passing through canal zone waters or (l) the activities of the Tennessee Valley Authority; or "arising in" (k) a foreign country.

Analysis of the types of exceptions from the "any claim" coverage is revealing in that it shows the variety and care with which the exceptions were spelled out. Particularly informative on the questions of both contribution and third-party practice, is exception (d) as to admiralty and maritime torts for the stated reason that a remedy as to them already was available against the United States. The Suits in Admiralty Act of March 9, 1920, 41 *Stat.* 525, 46 U. S. C. § 741 *et seq.* (1940) permits actions against the United States where if such vessel or cargo "were privately owned" (§ 742) a proceeding in admiralty could be maintained, such suits to be heard and determined according to the principles of law and to the rules of practice obtaining "*in like cases between private parties*" (§ 743). Of the two statutes the Federal Tort Claims Act has been said to have "the more far reaching language." *Hill* v. *United States*, 74 F. Supp. 129, 132 (N. D. Tex. 1947); *accord*, *Employers' Fire Ins. Co.* v. *United States*, 167 F. 2d 655, 657 (9th Cir. 1948).

The United States, though not mentioned by name in the Rule, certainly can be impleaded on a claim for contribution under Admiralty Rule 56. Joint suit against the United States is said to have become "almost common practice." *Englehardt* v. *United States*, 69 F. Supp. 451, 453 (D. Md. 1947). An example of impleader of the United States is to be found in *The Cotati*, 2 F. 2d 394 (S. D. N. Y. 1923) and of a joint action in *Olavarria & Co.* v. *United States et al.*, 56 F. Supp. 758 (S. D. Ala. 1944). In rejecting the narrow construction of the Tort Claims Act urged by the Government with respect to derivative claimants in *Niagara Fire Ins. Co.* v. *United States*, 76 F. Supp. 850, 856 (S. D. N. Y. 1948), Judge Medina likened the Suits in Admiralty Act and the Federal Tort Claims Act as both fitting into the historical background of the waiver of sovereign immunity in such fashion as to indicate a satisfaction on the part of Congress with the formula "where the United States, if a private person, would be liable." And although the Court of Appeals for the Third Circuit thought emphasis properly was laid on the admiralty practice permitting joinder, *Howey* v. *Yellow Cab Co.* v. *United States*, (R. 22), the Court of Appeals for the District of Columbia Circuit opinion fails to consider the parallel.

This Court has looked to the exceptions contained in Section 421 as leading to the conclusion that further exceptions were not to be judicially created. Thus, it was said in *Brooks* v. *United States*, 337 U. S. 49, 51 (1949):

> "The statute's terms are clear. They provide for District Court jurisdiction over *any* claim founded on negligence brought against the United States. We are not persuaded that 'any claim' means 'any claim but that of servicemen.' The statute does contain twelve exceptions. § 421. None exclude petitioners' claims."

The gravamen of the Government argument with respect to both the allowance of contribution and its maintenance through the expeditious third-party procedure seems

to be that the Tort Claims Act did not contain in the jurisdictional and liability section (410) the statement that "any claim for contribution" shall be included, nor in the procedural section (411) that "the Federal Rules of Civil Procedure, but not Rule 14 (a), shall apply. The draftsman's task would be well-nigh interminable if inclusive terms such as "any claims", "in the same manner", and "to the same extent as a private individual" are not to be given their plain everyday meanings. There would seem to be no more reason for making specific reference to joint or concurrent tortfeasors than to derivative claimants, nor to third-party defendant and joint defendant practice than to joint plaintiff procedure. Certain special treatment of the United States was set out in the Act. Surely, Congress should be privileged to use inclusive language to cover the remaining situations. With respect to derivative claimants the Government made similar efforts to cut down the area of Tort Claims Act operation. Its contentions were rejected by seven of the eight Courts of Appeals which considered them, one of which stated in *Employers' Fire Ins. Co.* v. *United States*, 167 F. 2d 655, 657 (9th Cir. 1948):

> "The Government has premised its position largely on the principle that statutes in derogation of sovereign immunity must be strictly construed. Where a statute contains a clear and sweeping waiver of immunity from suit on all claims with certain well defined exceptions, resort to that rule cannot be had in order to enlarge the exceptions."

The lower courts' reluctance to give effect to the Tort Claims Act's general waiver of immunity is clearly shown both in the District Court's frank characterization of its dismissal of the third-party complaint as an application of the rule of strict construction (R. 7), and in the appellate court's affirmance—despite the latter's lip-service to the "broad construction of the Act" laid down by this Court (R. 35). To be contrasted with these examples of restrictive construction is the view of this Court expressed

through the Chief Justice in *United States* v. *Aetna Surety Co.*, 338 U. S. 366, 383 (1949):

> "In argument before a number of District Courts and Courts of Appeals, the Government relied upon the doctrine that statutes waiving sovereign immunity must be strictly construed. We think that the congressional attitude in passing the Tort Claims Act is more accurately reflected by Judge Cardozo's statement in *Anderson* v. *Hayes Construction Co.*, 243 N.Y. 140, 147, 153 N.E. 28, 29-30: 'The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced.'"

2. The Legislative History of the Tort Claims Act Indicates an Intention to Leave the Matter of Contribution to Local Law.

As Mr. Justice Reed stated in *United States* v. *Spekar*, 338 U. S. 217, 219 (1949):

> "The Federal Tort Claims Act of 1946 was the product of some twenty-eight years of congressional drafting and redrafting, amendment and counter-amendment."

It would therefore seem that the statute should mean to the courts what the Act's language reasonably conveys to those who are expected to be guided by it. If, as we have urged, the words of the statute are enough, there is no need to seek further confirmation by searching the legislative history to ascertain what may have been in the minds but not put into the words of the men behind the statute, or behind the bills which were not enacted into law. It is at least dubious whether the legislative history sheds light or shadow. The District of Columbia Circuit from a consideration of the legislative history of the Act thought that (R. 34):

> "Congress did not intend the United States to be joined as a third-party defendant."

The Third Circuit, on the other hand, from such a study thought (R. 21):

> "... it may be concluded that it was not the intention of Congress to cause the United States to be treated in a different manner from any private litigant in respect to joinder * * *."[2]

Nevertheless, the more modern history of the efforts to remove the much-criticized exemption of the sovereign from answerability for the negligence of its servants, does indicate that in the culminating "Act to provide for increased efficiency in the legislative branch of the Government", the Congress decided to leave the rights and liabilities of the United States in cases involving joint tortfeasors to be determined by the local law.

Passing over the earlier interesting but unavailing efforts to secure passage of an equitable application of tort liability to the United States, an examination of legislative history may begin profitably with the 76th Congress. The Federal Tort Claims Act was part of the Legislative Reorganization Act of August 2, 1946, c. 753, Title IV of PUB. LAW 601, 79th Cong., 2d Sess., 60 STAT. 842, and evolved from successive closely related drafts from S. 2690, 76th Cong., 1st Sess., Section 306 of which provided:

> "SEC. 306. If the damage, loss, injury, or death is caused under circumstances creating a legal liability on the part of some person other than an officer, agent, or employee of the Government or upon some corporation, State, or political subdivision, to pay damages therefor, jointly with the United States, then, and in that event, the recovery against the United States shall be only for the pro rata share of the damages in proportion to the number of parties, so jointly or severally liable."

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[2] See also the student Recent Decisions Comment upon the district court ruling in the instant case: "a decision which disregards the local law on the right of contribution and interprets strictly the words of the Act seemingly vitiates its whole purpose." 35 VA. L. REV. 925, 927 (1949).

Judge Holtzoff, then with the Department of Justice, in explaining this provision in *Hearings before a Subcommittee of the Senate Committee on the Judiciary on S. 2690,* 76th Cong., 3rd Sess. 40 (1940) stated that:

> "Section 306 is a provision regarding which a question or two was asked during the last hearing. It relates to a situation in which the Government is a joint tort feasor with someone else. Suppose, for example, there were two joint tort feasors and the Government is one of them. We might envisage a case in which one joint tort feasor is insolvent and financially irresponsible. On the other hand, however, where there are two joint tort feasors, either one should not logically be liable for more than one-half, even though under our law recovery can be had for the whole amount against either. In many States, as you will recall, they are getting away from the old rule of no contribution among joint tort feasors. In many States they are allowing contribution to a certain extent. This provision approaches the problem from a somewhat different angle, but tries to arrive at the same result."

Identical to Section 306 of S. 2690 was the same section in H.R. 7236, 76th Cong., 1st Sess., of which H.R. Rep. No. 2428, 76th Cong., 3d Sess. 5, stated:

> "Section 306 deals with cases in which the Government is one of two or more joint tort-feasors. In such cases the Government is to be liable only for its pro rata share of the damages. Cases in which the other joint tort-feasor is an officer, employee or agent of the Government are excepted."

The language of former bills relating to the multiple liability situation was slightly altered in H.R. 6463, 77th Cong., 2d Sess., in which Section 403 read:

> "Sec. 403. If the damage, loss, injury, or death *with respect to which a claim is made pursuant to this Act* is caused under circumstances creating a legal liability on the part of some person other than an employee of the Government to pay damages therefor, jointly or *severally* with the United States, the award or judg-

> ment against the United States shall be only for the pro rata share of the damages in proportion to the number of parties so jointly or severally liable." (Emphasis supplied.)

The foregoing revision would seem to include a claim for contribution within its provisions as to being "severally" liable with the United States, irrespective of whether the plaintiff chose to name both the other person and the United States in the plaintiff's original complaint. Assistant Attorney General Shea, explaining the bill on behalf of the Department of Justice, said of the section in *Hearings before the House Committee on the Judiciary on H.R. 5373 and H.R. 6463*, 77th Cong., 2d Sess. 34 (1942):

> "* * * I have come to Section 403. It provides for proportionate liability of the United States, based upon the number of parties liable, where the damage has been caused jointly by a Federal employee and someone else. That is, if the tortious injury is committed by the Federal employee and two others, the United States will only be liable for one-third."

In reporting out the bill, then known as S. 2221, the House Committee on the Judiciary explained in H.R. REP. No. 2245, 77th Cong., 2d Sess. 12 (1942):

> "Section 403 of the Senate bill provided for proportionate liability of the United States where a Government employee was a joint tort-feasor with someone else. This provision is not contained in the recommended bill and *in cases involving joint tort-feasors the rights and liabilities of the United States will be determined by the local law.*" (Emphasis added.)[3]

Thus, Congress indicated as plainly as words could convey that contribution between tortfeasors was to be left for determination according to local law. Although other later bills contained sections similar to the earlier provisions

[3] This House Committee Report likewise stated that "no person may be joined with the United States as a defendant." The procedural point is treated *infra*, pp. 17-22.

(S. 1114, 78th Cong., 1st Sess., Sec. 403 (1943)) the foregoing expression of the purpose to leave the matter of contribution to be decided by local law was never thereafter modified or rejected. Furthermore, H.R. 181, 79th Cong., 1st Sess. (1945), as well as the bill which became law, S. 2177, 79th Cong., 2d Sess. (1946), followed the example of the House Committee on the Judiciary in making no further mention of proportionate liability, thus leaving such cases to local law.

3. Liberal Multi-Party Procedure Under the Tort Claims Act Should Not Be Defeated by Strained Analogy to Tucker Act Procedure.

The answer to the prime question of the allowance of contribution *vel non* under the Federal Tort Claims Act, where allowable under local law, being in the affirmative, the secondary question of its manner of assertion in a third party complaint or by separate action becomes of importance.[4] The Court of Appeals *held* in the instant case that the third-party complaint was not the appropriate procedure (R. 35). In so doing it was strongly influenced (R. 32) by an asserted parallel to the Court of Claims Tucker Act joinder prohibition as set forth in *United States* v. *Sherwood*, 312 U.S. 584 (1941), extended by the court below to the Federal Tort Claims Act in *Sappington* v. *Barrett and United States*, 182 F. 2d 102, 103 (D.C. Cir. 1950).[5]

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[4] The Court of Appeals below declined to pass herein upon the substantive question of whether contribution is recoverable at all from the United States. The district court's dismissal upon the broader question expressly was affirmed upon the procedural point only (R. 35). Mr. Justice Frankfurter in *Keifer & Keifer* v. *R. F. C.*, 306 U. S. 381, 396 (1939) was of the opinion that "a steadily growing policy of governmental liability" should not be "contingent upon irrelevant procedural factors."

[5] The *Sherwood* and *Sappington* cases involved *joinder* of defendants, whereas the instant case involves a single *third-party* defendant. In the only reported district court *third-party* case located,

The short answer to the analogy urged is that a third-party complaint for contribution against the United States *alone* does not involve a question of joinder at all. No one is called upon to answer a claim for contribution except the United States until some third-party plaintiff brings in both the United States and one or more *additional* third-party defendants upon a contribution claim. Accordingly, even if Congress could be said not to have intended *joinder* of the United States on a claim for contribution, the supposed case is not this one.

Moreover, it is submitted that even as to joinder the Tucker Act of 1887 and decisions thereunder should not be extended to the more liberal statutory waiver contained in the Tort Claims Act of 1946. In the *Sherwood* opinion on the Tucker Act, the Court plainly stated, *supra*, at 590:

> "The section must be interpreted in the light of its function in giving consent of the Government to be sued, which consent, since it is a relinquishment of a sovereign immunity, must be strictly interpreted."

That the Court considers this rule of strict construction to be inappropriate to the Federal Tort Claims Act is clear from the Court's opinion in *United States* v. *Aetna Surety Co.*, 338 U.S. 366, 383 (1949):

> "* * * The Government relied upon the doctrine that statutes waiving sovereign immunity must be strictly construed. We think that the congressional attitude in passing the Tort Claims Act is more accurately reflected by Judge Cardozo's statement in *Anderson* v. *Hayes Construction Co.*, 243 N.Y. 140, 147, 153 N.E. 28, 29-30: 'The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced.' "

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the United States was successfully kept in by a private defendant as a third-party defendant upon a claim for indemnity (which, also equitable in origin, is contribution with a vengeance). *Newsum* v. *Pennsylvania R. R.* v. *Williams and United States*, 79 F. Supp. 225 (S. D. N. Y. 1948).

In relying for its holding upon the Tucker Act and the associated *Sherwood* decision, the Court of Appeals below (R. 30) emphasized the following language from a report on H.R. 181, 79th Cong., 1st Sess., a predecessor of the bill which the 79th Congress, 2d Session, enacted into law:

> "It is intended that the district courts in exercising jurisdiction under this title shall exercise essentially the same type of jurisdiction as district courts exercise concurrently with the Court of Claims of the United States under the Tucker Act (Act of March 3, 1887, 24 Stat. 505; 28 U.S.C. sec. 41 (20). The bill therefore does not permit any person to be joined as a defendant with the United States and does not lift the immunity of the United States from tort actions except as jurisdiction is specifically conferred upon the district courts by this bill. (See *United States* v. *Sherwood*, 312 U.S. 584 (1941); *Lynn* v. *United States*, 110 F. (2d) 586, 588 (C.A.A. 5th, 1940); *Waite* v. *United States*, 57 C. Cls. 546 (1922); *Jackson* v. *United States*, 27 C. Cls. 74, 84 (1891). The phrase 'as a court of claims' in section 301 of the Senate bill was deleted as surplusage." (H.R. REP. 1287, 79th Cong., 1st Sess., p. 5)

Similar language as to non-joinder is likewise to be found in the report on another earlier bill. Thus, in H. R. REP. No. 2245, 77th Cong., 2d Sess., the view is expressed, at 12, that "no person may be joined with the United States as a defendant", and, at 9, "The bill therefore does not permit any person to be joined as a defendant with the United States * * * ." These earlier opinions as to non-joinder were not carried forward into the report on S. 2177, the bill enacted into law. The latter report made no reference to joinder or to the *Sherwood* and kindred cases and contented itself with stating that "The liability of the United States will be the same as that of a private person under like circumstance, in accordance with the local law, * * *" and pointing out that "the practice and procedure shall be in accordance with the Rules of Civil Procedure * * *." SEN. REP. No. 1400, 79th Cong., 2d Sess. 32 (1946).

The Court of Appeals for the Third Circuit thought that the omission from SEN. REP. 1400 of any reference to joinder gave plausibility to the contention that the earlier intention expressed by the members of the House Judiciary Committee was not insisted upon (R. 20). And as Judge Hulen, Judge of the United States District Court in the Eastern District of Missouri, said in an address on the Tort Claims Act, reported at 7 F. R. D. 689, 699, 700 (1948):

> "* * * the inclusion of a section specifically making the Federal Rules of Civil Procedure applicable to proceedings under the Act would seem to counterbalance what was said before the Judiciary Committee * * *."
>
> "Local law will determine as between the Government and a joint tort-feasor, issues of pro rata liability and rights of contribution."[6]

The Court of Claims was established to pass upon claims against the United States, not against individuals. The 1887 Tucker Act gave the district courts jurisdiction *concurrent* with the Court of Claims to hear such claims involving up to $10,000. Thus, Congress could hardly have intended in 1887 that Tucker Act cases could be otherwise than against the Government *alone*. Tucker Act jurisdiction had become so firmly crystallized that application to such cases of the Federal Rules of Civil Procedure (which became effective in 1938) failed to persuade this Court that individual defendants were thereafter to be within the long-established Tucker Act jurisdiction. In the 1946 Federal Tort Claims Act, on the other hand, Con-

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[6] This was likewise the opinion on joinder of an attorney in the Torts Section Claims Division, Department of Justice. Gottlieb, *The Federal Tort Claims Act—A Statutory Interpretation*, 35 GEO. L. J. 1, 27, 34 (1946). As a corollary, the same author considered that the United States, assuming propriety of joinder, has "no basis to contest a co-defendant's right to contribution against it * * *." Gottlieb, *Some Aspects of Contribution and Indemnity in Tort Actions Against the United States*, 9 FED. B. J. 391, 407 (1948).

gress was specific that the Federal Rules *should govern* the "practice and procedure" thereunder. Thus, there was a very different historical framework between the Tucker and Tort Claims Acts. See Chesnut, J., in *Englehardt* v. *United States*, 69 F. Supp. 451, 453, 454 (D. Md. 1947).

It is true, as the Court of Appeals opinion below points out (R. 32), that provision was made for appeal to the Court of Claims in Tort Act cases *provided all the parties to the appeal consent*. From this, the Court of Appeals reasoned that it was unlikely Congress intended the Court of Claims to determine judicial controversies between private litigants which would be something quite different from its normal function (R. 33). However, it is submitted that the conclusion drawn by the court from the very limited appellate jurisdiction given the Court of Claims is the converse of the conclusion which should have been drawn. The appellate jurisdiction in the Court of Claims is so limited, (and so unlikely to be utilized due to geography, if for no other reason), that the proper conclusion should be that as to tort claims it was to have a purely supporting role—certainly not that the trial court jurisdiction was to be ascertained by a consideration of what type of litigant normally appeared as defendant in the Court of Claims. The giving of this limited appellate jurisdiction to the Court if Claims seems to have stemmed from a desire that it not be left "altogether from the picture" rather than a desire to give it a significant part in the handling of the new type of cases. This was made clear by Assistant Attorney General Shea, as the Department of Justice Representative, in *Hearings before the House Committee on the Judiciary on H. R. 5373 and H. R. 6463*, 77th Cong., 2d Sess. 17, 18 (1942):

> "Mr. McLaughlin. Mr. Chairman, may I ask a question? I notice in title III that the Court of Claims is clothed with appellate authority. How did you arrive at that determination? That provision will clothe the Court of Claims with an absolutely new authority, will

it not? The Court of Claims today has no appellate jurisdiction, as I understand it.

• • •

Mr. SHEA • • • The reason for appellate jurisdiction in the Court of Claims is this: In the prior bill the Court of Claims had concurrent jurisdiction with the district courts.

Mr. CELLER. You mean the district courts exercising original jurisdiction?

Mr. SHEA. That is right.

Mr. CELLER. That is a district court without a jury?

Mr. SHEA. That is right.

And it appeared to us that the court was not well geared to handle the trial of these cases as a nisi prius court. The trial of cases in the Court of Claims is befor commissioners.

The district court judges have experience in the trial of tort cases. They know the State law and they have been sitting on this kind of case, which the Court of Claims has not been. So it appeared to us that the nisi prius jurisdiction should be exclusively in the district courts.

• • •

"• • • It seemed to us, on the other hand, in view of the fact that Congress has relied largely on the Court of Claims as the tribunal handling claims against the United States—that has been the most significant court in the claims picture—that it was probably not desirable to exclude it altogether from the picture, and if it was not going to have nisi prius jurisdiction, then it ought to act in the appellate stages."

And in this connection it is significant that Section 412 (a) of the Federal Tort Claims Act provided for review in the Court of Claims "*provided*" the notice of appeal carried written consent "on behalf of all the appellees." Plural parties defendant certainly seem to have been contemplated by the use of "all the appellees" since Congress is not likely to have expected the Government to be the appellant or losing side in every case.

The concern expressed by the Court of Appeals below (R. 33) over possible trial problems arising from a jury trial as to an individual defendant, and a non-jury trial as to the United States, was not deemed of serious consequence by the Third Circuit (R. 18), nor by so experienced a trial judge as Judge Chesnut. *Englehardt* v. *United States*. 69 F. Supp. 451, 454 (D. Md. 1947). Judge Goldsborough occupied the dual role in the unreported case of *Theodore Brown* v. *Capital Transit Co.* v. *United States*, Civil No. 387-47, D. D. C. Jan. 26, 1949. The wide discretion possessed by federal district courts as to remittiturs, new trials and directed verdicts should be sufficient to enable them to avoid the potential difficulties which have been urged as indicative of a congressional intent to allow neither contribution claims, nor third-party complaints, nor joint suits. The trend of modern procedure being to secure in one litigation expeditious handling of disputes among all the affected parties, a very clear expression of intent should be required before reversal of this customary practice in private litigation. Rule 20 (b) gives the district court authority to order separate trials and enter other orders to prevent delay or prejudice from joinder of parties, and Rule 42 (b) gives similar power as to separate trials of any "claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party, claims, or issues".[7] Chief Judge Laws took advantage of the flexibility inherent in the Federal Rules where an asserted misjoinder was urged by directing under Rule 21 that the jury trial as to the individual defendant be held first, to be followed immediately before the same judge as to the tort claim against the United States. *Ezzell* v. *United States and Independent Taxi Owners Ass'n.*, Civil No. 3888-47, D.D.C. Oct. 18, 1949. Such intelligent use of the federal trial

[7] Form of trial under the Federal Rules is determined not for the action as a single unit but as to each issue. FED. R. CIV. PROC., 38, 39.

court's powers should cause most of the Government's hypothetical procedural objections to disappear. Should any difficulties remain, legislative action would seem to be the proper remedy, since it was the Congress which directed that the United States, both substantively and procedurally, was to be liable "in the same manner" as a private individual.

CONCLUSION.

The Federal Tort Claims Act marks a conspicuous achievement in renunciation of the monarchial concept that "The King can do no wrong." The decisions of the District Court and the Court of Appeals in the case at bar are contrary to the modern climate of public and judicial opinion which has become increasingly inhospitable to claims of governmental immunity. The purpose of Congress in passing the Tort Claims Act was to rid itself of the burden of considering private claim bills by placing the United States on the same plane as a private employer.

It is indisputable that a private individual, postured as is the Government in this case, would be answerable to petitioner on its third-party complaint for contribution. Since frustration of legislative intent is to be avoided whenever possible, the issue in this case is simple: Is the United States, or is it not, to be liable "to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances" as Congress has directed in the Federal Tort Claims Act? If so, the court below should be reversed.

Respectfully submitted,

GEORGE D. HORNING, JR.,
JOSEPH J. SMITH, JR.,
FRANK F. ROBERSON,
Counsel for Petitioner.

HOGAN & HARTSON,
Of Counsel.

November, 1950.

APPENDIX

Statutes and Rules Involved

1. Sections 410(a), 411, and 421 of the Federal Tort Claims Act, Act of August 2, 1946, c. 753, Title IV, 60 STAT. 842, now, with immaterial amendments in the new Judicial Code, provide:

> Sec. 410 (a) Subject to the provisions of this title, the United States district court for the district wherein the plaintiff is resident or wherein the act or omission complained of occurred, including the United States district courts for the Territories and possessions of the United States, sitting without a jury, shall have exclusive jurisdiction to hear, determine, and render judgment on any claim against the United States, for money only, accruing on and after January 1, 1945, on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death in accordance with the law of the place where the act or omission occurred. Subject to the provisions of this title, the United States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances, except that the United States shall not be liable for interest prior to judgment, or for punitive damages. Costs shall be allowed in all courts to the successful claimant to the same extent as if the United States were a private litigant, except that such costs shall not include attorney's fees.
>
> Sec. 411. In actions under this part, the forms of process, writs, pleadings, and motions, and the practice and procedure, shall be in accordance with the rules promulgated by the Supreme Court pursuant to the Act of June 19, 1934 (48 Stat. 1064); and the same provisions for counterclaim and set-off, for interest upon judgments, and for payment of judgments, shall

be applicable as in cases brought in the United States district courts under the Act of March 3, 1887 (24 Stat. 505).

Section 421. The provisions of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assesssment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by the Act of March 9, 1920 (U. S. C., title 46, secs. 741-752, inclusive), or the Act of March 3, 1925 (U. S. C., title 46, secs. 781-790, inclusive), relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of the Trading with the Enemy Act, as amended.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) Any claim arising from injury to vessels, or to the cargo, crew, or passengers of vessels, while passing through the locks of the Panama Canal or while in Canal Zone waters.

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

2. The new *Judicial Code,* Title 28, *United States Code,* as enacted by the Act of June 25, 1948, Public Law 773, 80th Cong., 2d Sess. and amended by the Act of May 24, 1949, Public Law 72, 81st Cong., 1st Sess. provides:

28 U. S. C. 1346 *United States as defendant.*

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and thet District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, for injury or ross of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employement, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U. S. C. § 2674. *Liability of United States.*

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

• • • • •

28 U. S. C. § 2680 lists the same exceptions, with slight citation changes to conform to the new Judicial Code, as were listed, *supra,* in the original Act.

3. Pertinent among the Federals Rules of Civil Procedure is Rule 14(a) which provides in part:

> Rule 14: Third-Party Practice.
>
> (a) *When Defendant May Bring in Third Party.* Before the service of his answer a defendant may move *ex parte* or, after the service of his answer, on notice to the plaintiff, for leave as a third-party plaintiff to serve a summons and complaint upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. If the motion is granted and the summons and complaint are served, the person so served, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in Rule 12 and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendants may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff.
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> * * * * *

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No. 204

In the Supreme Court of the United States

OCTOBER TERM, 1950

CAPITAL TRANSIT COMPANY, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES

In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 204

CAPITAL TRANSIT COMPANY, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES

The Government has petitioned for a writ of certiorari to review the decision of the Court of Appeals for the Third Circuit in *Howey* v. *Yellow Cab Co.*, 181 F. 2d 967. *United States* v. *Yellow Cab Co.*, No. 218 this Term. In that petition we have stated our view that the instant decision is correct and that the Court of Appeals for the Third Circuit has erred in holding that the Federal Tort Claims Act (1) permits

joinder of the United States as a third-party defendant and (2) consents to suit against the United States by a joint tortfeasor on a claim for contribution. We have pointed out, as does the petitioner in the instant case (Pet. 3-4), that the holding below is in square conflict with the Third Circuit decision on the question whether joinder of the United States as a third-party defendant is permissible under the Federal Tort Claims Act. We have noted also that the instant decision, holding joinder unauthorized, does not reach the question whether the United States is liable for contribution. We have urged, however, that the two questions are intimately related, that both are of general importance, and that both merit review by this Court.

For the reasons stated in our petition in *United States* v. *Yellow Cab Co., supra*, we do not oppose the granting of the present petition for a writ of certiorari.

Respectfully submitted,

ARNOLD RAUM,
Acting Solicitor General.

AUGUST 1950.

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In the Supreme Court of the United States

OCTOBER TERM, 1950

CAPITAL TRANSIT COMPANY, *Petitioner*

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia (R. 6-8) is reported at 87 F. Supp. 94. The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 27-35) is reported at 183 F. 2d 825.

JURISDICTION

The judgment of the Court of Appeals was entered on June 5, 1950 (R. 36). The petition for

a writ of certiorari, filed on July 18, 1950, was granted on October 9, 1950 (R. 39). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Tort Claims Act authorizes impleading the United States as a third-party defendant.

2. Whether the Tort Claims Act subjects the United States to liability for contribution to a joint tortfeasor.

STATUTE AND RULE INVOLVED

Pertinent portions of the Federal Tort Claims Act, in its original form (60 Stat. 842, 28 U.S.C., 1946 ed., 931 *et seq.*),[1] and Rule 14(a) of the Federal Rules of Civil Procedure are set forth in the Appendix to the Brief for the United States in *United States* v. *Yellow Cab Company*, No. 218, this Term.

STATEMENT

On June 9, 1949, Kenneth Neil Stradley brought suit against the Capital Transit Company, petitioner here, for personal injuries he had allegedly received, on or about August 4, 1947, when one of petitioner's streetcars aboard which he was a passenger collided with a jeep owned by the United States. Alleging that the collision had resulted

[1] See note 1, p. 2, in the Brief for the United States in *United States* v. *Yellow Cab Company*, No. 218, this Term.

from the negligent operation of the streetcar by petitioner's employee, the complaint demanded judgment against petitioner for $50,000 plus costs. In accordance with Rule 38(b) of the Federal Rules of Civil Procedure, the plaintiff demanded a jury trial. (R. 1-3.)

Before answering, petitioner moved for leave to make the United States a party to the action and to serve upon the United States a third-party complaint (R. 3). Pursuant to an order granting this motion (R. 4) petitioner served its third-party complaint alleging that the jeep involved in the collision was being driven at the time by a United States soldier in the course of his employment and that the soldier's negligence had been the "sole or contributing cause" of the collision (R. 3-4). The third-party complaint demanded judgment against the United States "for a contributable portion of any sum" which might be awarded against petitioner in favor of the allegedly injured plaintiff, Stradley (R. 4).

The United States moved for dismissal of the third-party complaint on the ground that it failed to state a claim upon which relief could be granted (R. 5). In an opinion filed on October 26, 1949 (R. 6-8), the district court held that there was nothing in the Federal Tort Claims Act "constituting a waiver of immunity in respect of claims against the United States for contribution in actions in tort" (R. 7). Moreover, the court held,

decisions barring joinder of the United States with other defendants in suits predicated upon the Tort Claims Act supported its view that there was no jurisdiction for "the impleading of the United States as a third-party defendant solely for contribution" (R. 7-8). Accordingly, the court granted the motion and dismissed the third-party complaint (R. 8-10).

On appeal to the court below, the judgment of the district court was affirmed (R. 36). Holding "that the United States has not consented [in the Tort Claims Act] to be joined either as a co-defendant or as a third party defendant in a suit between private litigants" (R. 30), the court deemed it unnecessary to decide whether the right of contribution might be enforced against the United States in a separate action. Its affirmance, therefore, was declared to be "without prejudice to the maintenance of such a suit" (R. 35).

ARGUMENT

The questions presented in this case are the same as those presented in *United States* v. *Yellow Cab Company*, No. 218, this Term.[2] The brief for the

[2] In Pennsylvania, where the *Yellow Cab* case arises, contribution among tortfeasors is allowable by statute. 12 Pa. Stat. (Purdon) § 2081. In the District of Columbia the same result has been achieved by judicial decision. *George's Radio* v. *Capital Transit Co.*, 126 F. 2d 219 (C.A.D.C.); *Knell* v. *Feltman*, 174 F. 2d 662 (C.A.D.C.). It may be noted, in passing, that the Pennsylvania statute authorizing contribution is in effect merely a legislative affirmation of a rule

United States in the *Yellow Cab* case develops the reasons and authorities which we submit establish the correctness of the decision below in the instant case. Accordingly, we undertake here to deal only with two of petitioner's contentions which merit brief additional comment.

1. Petitioner suggests (Br. 9-10) that impleading the United States on a claim for contribution is permissible because it is not proscribed by any of the twelve exceptions in Section 421 of the Tort Claims Act (60 Stat. 845, now 28 U.S.C. 2680). If the Act elsewhere provided, either expressly or by implication, the requisite consent to both joinder and contribution, then there would be some point in urging that this consent was not withdrawn or disclaimed by any of the exceptions in Section 421. If, however, as we believe is clearly the case, the Act neither authorizes nor is consistent with petitioner's third-party action, then the argument premised on Section 421 is obviously fallacious. The absence of congressional consent to third-party suits for contribution cannot be supplied by the announcement of limitations upon the consent granted to suits on tort claims.

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which had earlier been announced in *Goldman* v. *Mitchell-Fletcher Co.*, 292 Pa. 354. See *Fisher* v. *Diehl*, 156 Pa. Super. 476, 482. The important point here, however, is that, regardless of any difference in source, the applicable local law is the same in Pennsylvania as in the District of Columbia, so that, in this as in every other presently material respect, No. 218 and the instant case are identical.

Actually, the twelve exceptions enumerated in Section 421, far from aiding petitioner, point up the correctness of our view that such a quasi-contractual claim as one for contribution is not encompassed by the Act. Examination of these exceptions reveals that they exclude varieties of *tort claims*—(1) claims based upon torts arising out of specified types of governmental activity (subsections (a), (b), (c), (d), (e), (f), (g), (i), (j), (l) of Section 421); (2) claims based upon intentional torts (subsection (h)); and (3) claims arising in a foreign country (subsection (k)). Throughout the long history which led to the Tort Claims Act, it was repeatedly recognized that the proposed exceptions were to exclude "certain classes of torts" from the authorization of suit on "tort claims." H. Rep. No. 2428, 76th Cong., 3d Sess., p. 2; H. Rep. No. 2245, 77th Cong., 2d Sess., p. 5; H. Rep. No. 1287, 79th Cong., 1st Sess., p. 1; Hearings before Subcommittee No. 1 of the Committee on the Judiciary, House of Representatives, 76th Cong., 3d Sess., on H. R. 7236, p. 22. As we have shown in our brief in *United States* v. *Yellow Cab Company*, No. 218 (pp. 32-45), claims for contribution are not tort claims. Their inclusion among the exceptions in Section 421 would, therefore, have been pointless.

2. Equally without merit is petitioner's argument (Br. 11) that the court below should have been persuaded by decisions allowing joinder un-

der the Suits in Admiralty Act (Act of March 9, 1920, 41 Stat. 525, 46 U.S.C. 741, *et seq.*) rather than by the prohibition against joinder in suits under the Tucker Act. The defect in this contention is its tacit assumption that the choice of analogy is free and at large, a matter for conjecture and fresh value judgment. Congress has, however, already made the admittedly legislative decision, announcing in terms which leave no room for doubt that the Tort Claims Act was to be assimilated to the Tucker Act, as construed by this Court in *United States* v. *Sherwood*, 312 U. S. 584, and that joinder was therefore to be impermissible. See Brief for the United States in *Yellow Cab*, No. 218, pp. 10-13.

On the other hand, Congress has in effect accepted and confirmed the view that the rule in admiralty should be different. Five years after enactment of the Suits in Admiralty Act, Congress enlarged the waiver of immunity to admiralty suits by passing the Public Vessels Act (Act of March 3, 1925, c. 428, 43 Stat. 1112, 46 U.S.C. 781 *et seq.*) under which suits are "subject to and proceed in accordance with the provisions of * * * [the Suits in Admiralty Act] insofar as the same are not inconsistent * * * ." Section 2, 46 U.S.C. 782. Section 1 of the Public Vessels Act 46 U.S.C. 781) expressly authorizes, not only "[a] libel in personam in admiralty * * * against the United States," but also "a petition impleading

the United States * * * ." Congress might have spelled out the same inclusive jurisdictional grant in the Tort Claims Act. Instead, it indicated an unmistakably contrary intent.

The decision to forbid joinder under the Tort Claims Act, while allowing it under the Suits in Admiralty and Public Vessels Acts, is warranted by the differences between the two fields of law and reflected in the differences between the two statutory schemes. For example, the absence of a jury from admiralty suits makes it unnecessary to require special non-jury treatment for the Government. Consequently, the congressionally unforeseen and unintended difficulties of combining jury with non-jury trials under the Tort Claims Act (see Brief for the United States in *Yellow Cab*, pp. 16-19) present no problem in admiralty. Similarly, the assignment to the ordinary admiralty courts of jurisdiction over the United States as defendant suggests none of the complications posed by selection of the Court of Claims as an available appellate tribunal under the Tort Claims Act. *Id.*, pp. 19-21.

CONCLUSION

For the reasons set forth above and in the Brief for the United States in the *Yellow Cab* case, No. 218, it is respectfully submitted that the judgment of the court below should be affirmed.

PHILIP B. PERLMAN,
Solicitor General.

NEWELL A. CLAPP,
Acting Assistant Attorney General.

JAMES L. MORRISSON,
Special Assistant to the Attorney General.

PAUL A. SWEENEY,
MARVIN E. FRANKEL,
Attorneys.

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